No._____

United States Circuit Court of Appeals

Ninth Circuit

Appeal from the District Court of the United States for the District of Oregon

OREGON & CALIFORNIA RAILROAD COMPANY, A CORPORATION, *et al.*,
Defendants and Appellants

JOHN L. SNYDER, *et al.*,
Cross-Complainants and Appellants

WILLIAM F. SLAUGHTER, *et al.*,
Interveners and Appellants

vs.

THE UNITED STATES OF AMERICA
Appellee

—o—

TRANSCRIPT OF RECORD

VOLUME V

PAGES 2085-2665

TITLE

NAMES AND ADDRESSES OF SOLICITORS UPON THIS APPEAL

For Appellants
OREGON & CALIFORNIA R. R. CO., et al.:

WM. F. HERRIN,
P. F. DUNNE,
J. E. FENTON,
San Francisco, Cal.

WM. D. FENTON,
Portland, Oregon.

For Appellants—JNO. L. SNYDER, *et al.*:

A. W. LAFFERTY,
Portland, Oregon.

For Appellants—WM. F. SLAUGHTER, *et al.*:

L. C. GARRIGUS,
A. W. LAFFERTY,
MOULTON & SCHWARTZ,
Portland, Oregon.

DAY & BREWER,
Seattle, Wash.

A. C. WOODCOCK,
Eugene, Oregon.

For Appellee:

JAMES C. McREYNOLDS,
Attorney General.

CLARENCE L. REAMES,
U. S. Dist. Attorney for Oregon.

B. D. TOWNSEND,
F. C. RABB,
Special Assistants to the Attorney General.

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"CALIFORNIA RAILROAD COMMISSIONERS.

REPORT 7.

1886."

SEVENTH ANNUAL REPORT

OF THE

Board of Railroad Commissioners

OF THE

STATE OF CALIFORNIA

FOR THE

YEAR ENDING DECEMBER 31, 1886.

(SEAL).

SACRAMENTO.

State Office.....P. L. Shoaff, Supt. State Printing.
1887."

[2085]

Page 233:

"Central Pacific Railroad Company,

Names and Residences of Officers and Directors.

Leland Stanford, President.....San Francisco, Cal.
C. P. Huntington, First Vice-President
23 Broad Street, New York, N. Y.
Charles Crocker, Second Vice-President,
23 Broad Street, New York, N. Y.
Timothy Hopkins, Treasurer....San Francisco, Cal.
E. H. Miller, Jr., Secretary.....San Francisco, Cal.
Charles F. Crocker.....San Francisco, Cal.
Moses Hopkins.....San Francisco, Cal.

Business Address of the Company.

Fourth and Townsend Streets....San Francisco, Cal.
No. 23 Broad Street.....New York, N. Y.

The Central Pacific Railroad Company was incorporated August 22, 1870, and formed by consolidation of the companies whose names and dates of incorporation are shown in the table below:

1. Central Pacific Railroad Company, consolidated June 23, 1870. Central Pacific Railroad Company of California (chartered June 28, 1861; amended October 8, 1864.)

The Western Pacific Railroad Company, chartered December 13, 1862.....	The Western Pacific Railroad Company, consolidated November 2, 1869.
San Francisco Bay Railroad Company, chartered September 25, 1868	

2. California and Oregon Railroad Company, consolidated December 18, 1869.

California and Oregon Railroad Company, chartered June 30, 1865	California and Oregon Railroad Company, consolidated Jan. 16, 1868.
Marysville Railroad Company, chartered November 29, 1867..	
Yuba Railroad Company, chartered November 17, 1862.....	

3. San Francisco, Oakland and Alameda Railroad Company, consolidated June 29, 1870.

San Francisco and Alameda Railroad Company, chartered March 25, 1863.....	San Francisco and Alameda Railroad Company, consolidated Oct. 15, 1868.
San Francisco, Alameda and Stockton Railroad Company, chartered December 8, 1863....	

San Francisco and Oakland Railroad Company, chartered October 21, 1861.

4. San Joaquin Valley Railroad Company, chartered February 5, 1858.

The above four roads were consolidated August 22, 1870, under the name of the "Central Pacific Railroad Company."

Page 241:

"1. Date when the road, or portions thereof, were opened for public use (northward):

From Roseville Junction to Lincoln...Oct. 24, 1867.
From Roseville Junction to Wheatland.Oct. 28, 1867.
From Roseville Junction to Yuba....Sept. 19, 1868.
From Roseville Junction to Marysville.June 1, 1869.
From Roseville Junction to Nelson...May 31, 1870.
From Roseville Junction to Chico.....July 2, 1870.
From Roseville Junction to Sesma....July 11, 1871.
From Roseville Junction to Tehama..Aug. 28, 1871.
From Roseville Junction to Red Bluff..Dec. 6, 1871.
From Roseville Junction to Redding..Sept. 1, 1872.
From Roseville Junction to Delta....Sept. 1, 1884."

Page 259:

"State of California,
City and County of San Francisco. } ss.

Charles F. Crocker, Acting President of the Central Pacific Railroad Company, and E. H. Miller, Jr., Secretary of the said company, being duly sworn, depose and say, that the statements, tables, and answers contained in the foregoing sheets, have been compiled and prepared by the proper officers of said company, from its books and records, under their direction and supervision; that they, the deponents, have carefully examined the same, and that as now furnished by them to the Board of Railroad Commissioners, they are, in all respects, just, correct, complete, and true, to the best of their knowledge, and, as they verily believe, the same contain a full and true exhibit of the condition and affairs of said

company on the thirty-first day of December, 1885.

CHAS. F. CROCKER,
E. H. MILLER, JR.

Subscribed and sworn to before me, this fourteenth day of July, 1886.

E. B. RYAN, Notary Public in and for the City and County of San Francisco, California."

Whereupon defendants offered in evidence in connection with the testimony of witness, a certified copy of a resolution of Board of Directors of the California and Oregon Railroad Company, adopted October 8, 1866, assenting to the Act of Congress of July 25, 1866, and the same was received in evidence, marked "Defendants' Exhibit 284," subject to the objection of the Government that the same was immaterial and irrevelent, which said Defendants' Exhibit 284 is hereinafter set out and described and made a part of this statement of evidence, and identified as such.

Whereupon defendants offered in evidence as a part of the testimony of witness, a certified copy of the reports of the Commissioners to the President of the United States, approving and accepting the railroad constructed under the Act of July 25, 1866, from Roseville Junction northward 77.6 miles to a point near Chico, in California, of date August 9, 1870, with endorsements of approval and acceptance thereof by the Secretary of the Interior and the President of the United States, which reports were received in evidence and marked "Defendants' Exhibit 285," to which counsel

for complainant objected as immaterial and irrelevent, which said Defendants' Exhibit 285 is hereinafter set out and described, and made a part of this statement of the evidence, and identified as such.

Whereupon GEORGE M. CUMMING, called as a witness on behalf of defendants testified that he resides at San Francisco, is a civil engineer by profession, retired at the present time. He was shown what to the best of his recollection was a copy of the agreement of October 11, 1886, being Exhibit 1 to the answer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage in this suit, and asked to see if he could locate the original. To the best of his recollection an executed copy of this instrument was at one time in the files of the Pacific Improvement Company, in whose employ he was for quite a number of years. He called at the office of the Pacific Improvement Company in this City sometime in the early part of 1912. He does not remember exactly the month, and made a search of their office and also of the warehouse over in Alameda, in which place was supposed to be all the papers that they had that they were not using at that time, papers that were taken away from their own vault at Fourth and Townsend and stored after the fire of April, 1906, in San Francisco. He examined all the papers in that storehouse, paper by paper and was unable to locate the original of that. He was given absolutely free access to all the papers of the Pacific Improvement Company and searched very care-

fully every place where the paper should possibly have been. This typewritten copy is the one which was handed to him by Judge Singer to guide him in looking for the original, and while he could not state positively, in a general way he thinks it is a correct copy of the original document which he saw while he was in the employ of the Pacific Improvement Company, in its office or in its possession. He had the handling at one time, as such employe, of a great many contracts the details of which he does not remember, but while he cannot positively swear to it, he is almost positive that he must have handled that document in the course of his employment and he would say that this is a copy of the document which he handled. He was assistant engineer on the construction of the line between Delta and Ashland and an employe of the Pacific Improvement Company. He took orders from Mr. Hood who was in charge of construction. Witness was the office engineer in charge of the office work representing the Pacific Improvement Company in the construction of that mileage. He was not aware at the time, that he was in charge of the office and engaged in construction under the supervision of Chief Engineer Hood, under this contract, but he presumed that he was; that is, at that time he was not aware personally of that contract excepting in a general way. They knew that they were working for the Pacific Improvement Company which was building the road under contract. They understood that the work was to the State line for the Central Pacific Railroad Company. He was in charge of the

office under Mr. Hood but not in charge of construction and all of this time he was acting as an employe of and paid by the Pacific Improvement Company. All that he knew as to whether or not that railroad from Delta north to the State line was constructed by the Pacific Improvement Company under its contract said Exhibit 1, is that he was an employe of the Pacific Improvement Company and they were building the road for these different companies, but as to the existence of that specific contract at that time, he was not aware of it; that is, he was in a subordinate capacity. He does not know of his own knowledge who paid for the construction of that part of the railroad, what Company received the pay, excepting that he knows as an office engineer he made estimates and was an employe of the Pacific Improvement Company and they as contractors had at least one subcontract for masonry. The Pacific Improvement Company had no outfit for building masonry and that contract was sublet. He prepared the estimates at the end of the month for the masonry on the different 20 mile sections as they went along and turned this in to the Pacific Improvement Company. He knows that the Pacific Improvement Company paid these bills to the masonry contractor James Scobey. Witness was personally on the construction work from Delta to Ashland from June, 1886, to sometime in the fall of 1887. When he started in they were camped at a place called Mears Creek, in Shasta County, California, north of Delta on the first 20 mile section. They always counted by 20 mile sections north of Delta. That was

June, 1886. He started in at Mears Creek in June, 1886. The work had been progressing some time before that. He had been employed in the office in San Francisco for a time and had gone up on this construction work in 1886 in June, and they were there until some time in July when they moved their camp to a point just above Dunsmuir, they were there until sometime in August or September, 1886, when they moved to Sisson Station; they then moved from there and held a Thanksgiving Day celebration when the camp was at Edgewood, in Siskiyou County. They moved from there to what was the Salt Works on the Shasta River, several miles this side of the station which is called Montague. In January he came to San Francisco, just after the new year of 1887. They celebrated Christmas by going into Yreka from this place at the Salt Works and along in February, 1887, they moved to a point about 3 or 4 miles south of the Klamath River opposite Laird's ranch and on the first of June, 1887, they were camped right at the State line. In June or July they moved from the Siskiyou Mountains and camped on the land of Dollarhide who owned the toll road. That was the last camp that they had that he was in. That was the main office camp, besides that they had other smaller camps where an assistant engineer having a party in charge, or four or five men, was either ahead or behind the main office. They had small parties a great many miles ahead of them, but he is speaking now of the general office force, the headquarters. He left somewhere in the fall before the last spike was driven and does not recol-

lect now the exact date that he left. He quit about a month or two before the construction was completed in December, 1887. The work was well on to Ashland, as far as grading was concerned. He had been to Ashland and was familiar with the work going on, but did not stay until the end. Towards the end work slackened up, the number of men employed became gradually less as they got towards the finish, but he remembers as a matter of historical fact that the last spike was driven in December or before Christmas, 1887, from the fact of the return of some of the men from up there.

Whereupon defendants offered in evidence the typewritten copy of this document of date October 11, 1886, being Exhibit 1 of the answer.

Whereupon witness further testified that to the best of his recollection he was sufficiently familiar with the general records of the Pacific Improvement Company and made such a search based upon his familiarity with such records that he can assure the Court that the executed copy of this contract "Defendants Exhibit 283" was once in existence among the records and files of the Pacific Improvement Company, that it has since been lost and that it cannot now be found or produced and that "Defendants' Exhibit 283" is, according to his recollection, a copy of that lost instrument.

Whereupon counsel for complainant objected to said evidence as immaterial and irrelevant.

Whereupon said "Defendants' Exhibit 283" was received in evidence and marked "Defendants' Exhibit

283" and is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon witness further testified that he first entered the employ of the Pacific Improvement Company in 1881, some little time after he graduated from the University of California. He was first in its employ in Monterey, making surveys around Hotel del Monte and Pacific Grove, and in 1882 was in the employ of the Central Pacific Railroad Company, under S. S. Montague, chief engineer and continued in his employ until along in 1883 or '4 or '5. He was in the employ of the Pacific Improvement Company from 1885 until the fall of 1887, the time of the completion of this road. He entered the employ of the Southern Pacific Company and was in their employ until 1890. He re-entered the employ of the Pacific Improvement Company, in its office, from 1890 to 1902. After 1902 he was employed by the Southern Pacific Company up to 1910 and resigned from the employment of the Southern Pacific Company, December 31st, 1910. The president of the Pacific Improvement Company in the early days, along about 1883, '4, '5 and '6 was J. H. Strowbridge, but as he understood it, according to the by-laws of the Company, the secretary, F. S. Douty, was the executive officer and he knows that he was authorized to perform many acts as such executive officer. All of his business was done wth Frank S. Douty. He was supposed to be the executive officer of the Company. So far as his own employment was concerned with regard to the Pacific

Improvement Company, Douty was the man with whom he had to do. Witness was of course a subordinate employe and not an officer. The Pacific Improvement as far as he was concerned was a separate entity or corporation and was always looked upon as such, as having no connection with any of the others. Mr. Douty himself used to impress that upon his employes. Some of them, whether joking or in earnest, would ask the relationship to the Central Pacific Railroad Company and later to the Southern Pacific Company and Douty always insisted that they were absolutely separate corporations and had no connection one with the other. The Southern Pacific Company was incorporated in 1884. He did not personally know, while he was an employe of the Pacific Improvement Company, anything about the holdings of the stock or the control of the Pacific Improvement Company by any of these railroad companies. He had no access to the stock books whatever. So far as he knew no one directed Douty what to do or what not to do. He took orders himself from Douty and understood, and from his recollection of the by-laws, Douty was authorized and empowered to do a great many things. For instance, to sell land, execute deeds and contracts. The Southern Pacific Company, so far as he knew never undertook to make any direction or supervision or any orders directing or controlling the Pacific Improvement Company or its employes. There was an incident when they were in the same building at Fourth and Townsend when the Southern Pacific Company issued a set of rules for the

guidance of the employes of the company and for the tenants of the building. These rules were framed under glass and sent around to the different departments and one was sent in to the office of the Pacific Improvement Company. Douty called one of the clerks in the office, presented him with these and told him that he wanted these rules carried out. The clerk said that he would see that they were carried out. Douty said, "Excuse me, you don't understand what I mean. I want you to take these rules and carry them out and throw them in the ash heap. The Southern Pacific Company has nothing to do with us. We don't take orders from them." That was the general tenor of the two companies as far as the employes knew. He knows that there were quite a number of contracts where the Pacific Improvement Company constructed railroads or had contracts for the construction of other roads, or other properties other than this particular one of October 11, 1886. They were all kept in a box called "Contracts" that is, contracts for the construction of different lines. There was one for the Southern Pacific branch railway, one for the line from Collis to Fresno, one from Shingle Springs to Placerville, a lot of small roads that were built, and that the Pacific Improvement Company built under contract with these different roads. These roads were all subsequently incorporated either into the Central Pacific Railroad Company or the Southern Pacific Railroad Company, but he could not say who owned them all at the time they were built. He knows that they were small companies, separate corporations, and had

separate directors. The Pacific Improvement Company, during the time it was engaged in the construction of railroads, always had a construction outfit up to a certain time, but somewhere late in the 1890's the Pacific Improvement Company sublet its contracts to other contractors and did not actually perform the work themselves. Charles Crocker, the father of Charles F. Crocker, was the actual railroad builder. He was the man out in the field himself. He died in 1888. Crocker was present when the spike was driven. He was specially requested to come up there. C. P. Huntington, Leland Stanford, and T. R. Judah are dead. S. S. Montague, former chief engineer of the Central Pacific Railroad Company, died in 1884. Mark Hopkins died in 1887, F. S. Douty died April 11, 1900. J. H. Strowbridge is still alive, but he has not seen him for a great many years. He must be an old man well on to 90. He lives in Alameda County, but has not heard of him for a long time. Witness is informed that the Pacific Improvement Company still owns Del Monte and the property at Pacific Grove,—he has never heard of its parting with the title.

Whereupon upon cross examination, witness further testified that he graduated from the University of California in 1881, and shortly afterwards entered the employ of the Pacific Improvement Company, making application for the position to F. S. Douty.

"Q. Now, you have known, during all of your experience with the Pacific Improvement Company, the

general historical fact that C. P. Huntington, Leland Stanford, Charles Crocker and Mark Hopkins or their respective estates after they died, controlled and virtually owned the Pacific Improvement Company, did you not?

A. Well, I personally, of course, did not know that, but it was so stated in the papers and public prints many times.

Q. I don't mean, now, Mr. Cumming, to ask you to state as to the actual ownership of stock, but this general historical fact is what I wish to bring out. That is true, is it not?

A. That was generally believed in California.

Q. Do you know whether Mr. Douty owned any of the capital stock of the Pacific Improvement Company, other than a few qualifying shares to act as a director?

A. Well, I don't think he did. I don't know, though.

Q. What I mean is this, Mr. Cumming: In the same general way that you know that Mr. Harriman was the controlling spirit of the so-called Harriman lines, and Mr. Hill is the controlling spirit of the so-called Hill lines, you do know the historical fact that these four gentlemen who were associated in business, and were sometimes called the "Big Four" of California, did control the affairs of the Pacific Improvement Company?

A. Well, as I say, it was generally believed in California that that was so.

Q. Well, that has been believed so long that it has become an historical fact, has it not?

A. Well, I don't know whether I am competent to say that or not. I presume it has.

Q. Now, the same gentlemen also controlled the affairs of the Central Pacific Company, did they not?

A. The same answer to that. That is, it was generally believed in California that that was so.

Q. And also the Southern Pacific Railroad Company?

A. Yes, sir.

Q. And the several constituent companies, these other companies that I have mentioned, as rapidly as they were acquired?

A. That was generally believed, yes. Whether it was so or not, of course, I do not know.

Q. Of course, I do not refer now to a time after any of them died, but I mean down to the time that they died, and then their estates, of course, succeeded them. Do you know what the general business was of the Pacific Improvement Company?

A. Well, I know, as a matter of fact, that they were incorporated to do almost anything in the world, whether it was banking business, building railroads, buying and selling lands, loaning money, and everything else.

Q. Well, you know that they lived up to their articles of incorporation, too, don't you? They did engage in almost all kinds of business?

A. Yes, sir.

Whereupon witness further testified that he worked for the Pacific Improvement Company from 1881 to 1882. In 1882, he entered the employ of the Central Pacific Railroad Company under Montague, Chief Engineer, and afterwards in 1885 entered the employ of the Pacific Improvement Company again, serving until towards the fall of 1887, when he went into the employ of the Southern Pacific Company and was in its employ until 1890, when he went back into the employ of the Pacific Improvement Company and continued in its employ until 1902, and then returned to the employ of the Southern Pacific Company, remaining until December 31, 1910. Nearly half of the time since 1881, he has been in the employ of the Pacific Improvement Company and became acquainted with its general affairs in a general way and knows that it was the owner of a number of town sites along the lines of the Central Pacific Railroad Company and the Southern Pacific Railroad Company, also owned and leased some terminal facilities but does not think it operated any but presumes that the Railroad Companies themselves operated the terminal facilities but does not know. He does not remember and does not know that the Company owned and leased bridges at different points along the lines of

the railroad. The Pacific Improvement Company sold terminal facilities and right of way to the Railroad Company which were acquired in course of construction. The Pacific Improvement Company from 1881, down, did most of the construction of these railroads he has mentioned and under the terms of the contracts, as he remembers them, the Pacific Improvement Company was required to furnish right of way and depot grounds for the Railroad Company. He does not recall that that is not true in the case of contract Exhibit 1 attached to the defendants' answer. In most contracts the Pacific Improvement Company was authorized to use the name of the corporations for condemnation purposes. Sometimes the Pacific Improvement Company received in payment for constructing these lines of railroad, different portions of them, capital stock and bonds or other corporate securities and sometimes it was cost and a percentage. In some instances the Pacific Improvement Company constructed the railroad and the railroad merely paid it a percentage profit on the work. It was quite a common practice, during his experience, for employes of the Pacific Improvement Company, Southern Pacific Railroad Company and Central Pacific Railroad Company and afterwards the Southern Pacific Company to be interchanged. That is, for a man to be employed for part of his time by the Pacific Improvement Company and part of his time by these railroad companies. They shifted them from one to the other, from the payroll of one company to the payroll of another, as they would in any other business. The

Pacific Improvement Company constructed street railroads for the Oakland Railroad Company and for the Market Street Railway Company in San Francisco and Oakland. These are entirely independent companies and not subsidiary companies of the Southern Pacific Company, that is they are now, and he thinks they had no connection with the Southern Pacific Company at any time, so far as he knows. He believes also that the Pacific Improvement Company constructed a line in Washington, now a portion of the Northern Pacific—a coal road at Carbonado. The Pacific Improvement Company built up to 1902, or somewhere along there, most of the railroads that at that time constituted, or at least not most of them but a great many, that constituted, the Southern Pacific system at that time and that represented a very large proportion of the business done by the Pacific Improvement Company.

Whereupon witness further testified as follows:

"Q. Now, there was such a co-operation between the Pacific Improvement Company and these other railroad companies, of which Mr. Huntington, Mr. Hopkins, Mr. Crocker and Mr. Stanford were the principal stockholders—I say, there was such a co-operation between those companies that it became a matter of common rumor about the Pacific Improvement Company's office that they were virtually one enterprise?

A. Well, no, not as far as the secretary was concerned. He always insisted quite to the contrary. In fact, he was a crank on that subject, as to the separation of the two companies.

Q. I understand, but I say that the business was so carried on as to lead to general rumors of that kind among the employees of the Pacific Improvement Company, with the exception of the secretary?

A. Well, I don't know whether that is so or not. The secretary insisted that the two companies, or the different railroad companies and the Southern Pacific Company were not in any way part of the Pacific Improvement Company, and employees were instructed —in fact, when it came down to that, there was, as a matter of fact, you might say, a great deal of feeling between the employees of the Pacific Improvement Company and the employees of the Southern Pacific Company. They didn't consider themselves of the same outfit at all.

Q. There was considerable jealousy between them, was there not?

A. Yes, sir.

Q. The same as there has developed a jealousy between the officers and employees of the Oregon Railway and Navigation Company and the Southern Pacific Company since they were absorbed by the Harriman lines?

A. I don't know anything about that. I never was up on that road at all.

Q. Well, now, you say that Secretary Douty was constantly insisting that there was no identity between the Pacific Improvement Company and these railroad

companies?

A. Yes, sir.

Q. Well, why did he have to keep warning the employees of the Pacific Improvement Company of that fact?

A. I don't know, excepting he used to say it was merely the truth, that was all, that it was so, and he was simply trying to correct, as he used to say, a popular error.

Q. Well, he never issued any statements, or made any statements to indicate that the Pacific Improvement Company was not connected with the Northern Pacific Railroad Company, did he?

A. Well, I don't know whether he ever made any such statement as that or not. It probably never was called to his attention.

Q. None that you know of?

A. None that I know of.

Q. Or as to the Great Northern Railway Company?

A. No.

Q. Well, now, why was it that it was necessary for him to be constantly warning his employees that there was no connection between the Pacific Improvement Company and the Southern Pacific Company, or its constituent companies?

A. Well, I don't know his mental processes at all,

excepting what he said, that it was practically to disabuse their minds of any idea that they would get from anything they saw in the newspapers, or, as he put it, "popular error."

Q. Well, did you not testify on direct examination that it was common rumor among the employees of the office that they were virtually one and the same thing?

A. Well, no, I don't think I testified to that.

Q. Did you not say that there was a rumor to that effect, and that Mr. Douty used to make these statements to correct what he termed an error?

A. No. As I said, there might have been talk—I don't believe that I actually said that; that is, you asked me if it was not an historical fact that they were the same parties that owned both companies, and I answered that, as far as I knew, that that was commonly believed, yes.

Q. Well, now, did you know the historical fact that the Pacific Improvement Company owned virtually a controlling interest of the capital stock of the Southern Pacific Company?

A. I say that was generally believed, yes, but I didn't know it.

Q. You know the general historical fact, do you not, that the Southern Pacific Company was organized by Mr. Huntington and his associates whom I have heretofore mentioned, and became the general operating company for these constituent companies of the Southern Pacific system?

A. That is, the Southern Pacific Company?

Q. Yes.

A. Yes.

Q. And did you not know that at the time, or shortly after the Southern Pacific Company was organized, Mr. Huntington and his associates of whom I have spoken before, placed their Southern Pacific Company stock-holdings in the Pacific Improvement Company?

A. Well, I don't know that, no.

Q. You do not know that general historical fact?

A. Well, I have known quite a few historical facts in my time, which were subsequently ascertained not to be facts.

Q. Well, I am not asking for any historical facts that you have ascertained not to be facts. I am asking you for historical facts that you have not ascertained to be untrue.

A. Well, I don't know whether that was so or not —whether it was true or untrue.

Q. But you know that general historical fact, do you not?

Mr. Fenton: I object to the use of the word "historical" fact as misleading. A fact is a fact, and a rumor or report, or common rumor would be a different thing. It might be true or might not be true. And I make the further objection that all of this inquiry has

no relevancy to the question as to whether or not the lands involved in suit are subject to forfeiture for violation of the land grant made July 25, 1866, or any amendments thereto, or the act of May 4, 1870; and, of course is not cross-examination.

Q. I refer to the general historical fact that Mr. Huntington and his associates organized the Southern Pacific Company, under the laws of the State of Kentucky, as an operating company to take over under leases the several railroads constituting the present Southern Pacific Railroad System, and that they pooled their holdings of the Southern Pacific Company's stock in this Pacific Improvement Company?

A. That was a thing a great many people generally believed; but I don't know it.

Q. The Pacific Improvement Company had its offices in the same building as the Southern Pacific Railroad Company and Central Pacific Company?

A. Yes, sir.

Q. All of the constituent companies of the Southern Pacific Railroad System had their offices in the same building?

A. Yes, sir.

Q. And the Pacific Improvement Company also had offices in that building.

A. Yes, sir.

Q. When the rules promulgated by the Southern

Pacific Company were delivered in the office of the Pacific Improvement Company, do you know who it was that made the mistake that you have referred to? Who was it that delivered the rules there?

A. Who delivered them?

Q. Yes.

A. They were brought into the Pacific Improvement Company by a porter in the employ of the Southern Pacific Company, as I remember it.

Q. You don't know why this employee of the Southern Pacific Company made the mistake of considering the Pacific Improvement Company as virtually identical with the Southern Pacific Company?

A. I don't know whether he thought he made a mistake or anything. He probably was acting under orders from his superior officer, who was a Southern Pacific official.

Q. You never knew of the rules and regulations of any other railroad company being delivered in the offices of the Pacific Improvement Company, did you?

A. No, it didn't come to my knowledge. Possibly the Market Street Railway Company may have issued some rules of that kind, but I don't know anything about it.

Q. But you don't know of any of the rules of another railroad company having been delivered in the offices of the Pacific Improvement Company?

A. Not to my knowledge, no, sir.

Q. With the exception of these street railways that you have mentioned, it is a fact, is it not, that all of the railroads that were constructed by the Pacific Improvement Company for these various small railroad companies that you have mentioned, shortly after construction became merged into the Southern Pacific System?

A. Oh, I wouldn't say shortly afterwards. Some were shortly afterwards, and some some time afterwards.

Q. That may be because the fact was not brought to your attention until some time after it occurred?

A. Oh, excuse me, I misunderstood your question. Yes, that is a fact, yes. I thought you said it became incorporated in the Central or Southern. It was some time after they were constructed, in some cases quite a number of years, before they were consolidated into the Central or Southern Pacific Railroad Company.

Q. That is, as the Pacific Improvement Company constructed these lines of railroad, the general practice was for the Pacific Improvement Company to receive the corporate securities of the railroad company as the consideration for construction?

A. Yes.

Q. And then subsequently the lines of railroad would be merged into the Southern Pacific Railroad System?

A. Yes, they became part of the Southern Pacific

Railroad System afterwards, yes, sir.

Q. Now, you don't deny the general fact that there was obviously complete co-operation between the Pacific Improvement Company and these various constituent companies of the Southern Pacific System, do you?

A. I don't deny or affirm anything of that kind. I don't know.

Q. Well, what is the fact?

A. I don't know.

Q. You do not know whether there was co-operation between those companies?

A. Well, co-operation in what way?

Q. Well, in all substantial ways that affected the interests of those companies?

A. Well, all I know is, the Pacific Improvement Company built the road and turned it over—built these different roads and turned them over.

Q. Well, have you any way to account for the coincidence that, every time they constructed a railroad and took the corporate securities of the railroad in payment for construction, the Southern Pacific System subsequently absorbed those railroads?

A. Well, no, I don't know why they did it. All I know, the Pacific Improvement Company built the roads and received their pay for them, and they became part of the Southern Pacific System after they were built.

Q. But they were constructed originally as independent companies?

A. Yes, they were all separate corporations, all these small companies you speak of—separate corporations.

Q. And invariably, they afterwards went into the Southern Pacific System?

A. They all are in there now, yes.

Q. Did you know to what extent the Pacific Improvement Company was a stockholder of the Southern Pacific Company at any time in its history?

A. No, sir, I never knew that definitely.

Q. Therefore it necessarily follows that you know nothing of the circumstances under which it disposed of any of its holdings that it might have had?

A. No, sir.

Q. Now, as to the construction of this railroad north from Delta to Ashland, you were asked whether that railroad, or at least that part of it that is situated in California, was constructed under this Exhibit 1 annexed to the answer, which is identical with "Defendants' Exhibit 283," which you have identified?

A. Yes, sir.

Q. Now, isn't this the fact, Mr. Cumming: that you simply recollect that there was such a contract at one time, of which you saw a duplicate original, but as to whether it was superseded during the progress of this work of construction, you have no knowledge yourself?

A. No, sir.

Q. So you would not assume the responsibility of testifying to the conclusion that, in a legal sense, the road was constructed under this contract or any other particular contract?

A. Oh, no, sir; I couldn't draw any such conclusion as that.

Q. And you have no knowledge as to the contract under which the railroad was constructed in the State of Oregon?

A. No, sir.

Whereupon witness further testified that the Strowbridge referred to as president of the Pacific Improvement Company was generally in charge of all the grading forces in the construction work, he was not an engineer but was a practical railroad builder, he was the original—what we would call riding boss—on the old Central Pacific when that was constructed. Charles Crocker was the head pioneer in the field work. Originally Strowbridge was an employe or superintendent under Crocker, away back before the time of witness, that is what he heard, he does not know that of his own knowledge. Crocker died in 1888, Hopkins in 1877. Crocker returned from active work in the field after the completion of the Central Pacific sometime before 1870. The Central Pacific was completed May 10, 1869. Strowbridge did not have any other business than that of construction work, of course he was president of the Pacific Improvement Company, but witness means ac-

tive physical work in the field in the construction of railroads. Strowbridge was a masterful big man in his way, but he does not know that he would be termed a man of executive ability so far as office work goes. He was in and out of the field and in and out of the City, that is his work carried him over a great deal of territory and in the course of that migration he was passing in and out of San Francisco just the same as the chief engineer of the road was passing in and out. He was president of the Pacific Improvement Company, but the executive officer of that Company, under its by-laws, as he understood it, was its secretary. There were separate boards of directors of these various Companies, there may have been duplications of some or all of them, but he does not remember and does not know whether these separate boards of directors were identified in any way. His work with the Pacific Improvement Company was that of an engineer in charge of the office records of the Company, with reference to construction, and also other matters with regard to land, that is when he was in the San Francisco office. Out in the field, he was just simply on regular construction work in charge of the office, calculating estimates, figuring out quantities and work of that character. In the San Francisco office, he was there as an engineer and in charge of different branches of work, did almost anything besides engineering work that came up. He was, in a general way, familiar with different branches of the business. When he was out in the field he was engaged in making estimates, requisitions for necessary supplies, etc., figuring quantities on South-

ern Pacific contracts, in fact doing all the ordinary office work that an engineer would do on construction, making drawings of masonry plans and things of that kind. He could not say exactly when the Pacific Improvement Company started to construct the railroad north from Delta, but knows work was going on in 1885 when he was there. Whether it was Pacific Improvement Company or the Railroad Company he does not know. He was not engaged on it himself. He was working for the Pacific Improvement Company, but not in that neighborhood. He was out on some surveying work that had no connection with that work at that time —it was on another line of railroad. He was making preliminary surveys in Southern Oregon on a line from Ashland south to the state line to connect with the southern end of the railroad when it finally reached the State line and his recollection is that he was employed and paid, at that time, by the Pacific Improvement Company. This was a preliminary survey that he made, practically a *reconnaissance*. He does not think that they followed the general line of survey for the location of that railroad, they made several surveys and he thinks part of it was finally adopted, approximately, portions of it were adopted. There was construction work going on then north of Delta, and the men strung out for some little distance beyond, maybe twenty to forty miles, that was in 1885. In 1886, he actively went up on that work and they were then some twenty miles north of Delta with finished line. He does not know under what arrangement if any, the Pacific Improvement Company was extending this survey or making this survey from

Ashland to the southern boundary line of the State of Oregon during the year 1885. He never knew the history of that at all, the work was done under Hood's direction. Witness does not remember what official of the Pacific Improvement Company directed him to engage in the work, he was in a very subordinate capacity on that work and did not come in contact with anybody other than the immediate man that was running the party who was an assistant engineer. He was merely doing what they called topographical work on that survey and he does not know whether the assistant engineer that was in charge of the party was an assistant engineer of the Central Pacific Railroad Company or whether he was a Pacific Improvement Company employe. It is in part true that a great deal of that work was done under such circumstances that it was difficult for him to say whether it was done by the Pacific Improvement Company or by the Central Pacific Railroad Company, that is this first part, but he remembers positively they were paid on the construction work, he was an employe of the Pacific Improvement Company, and was paid by that Company. The chief engineer engaged on this work was paid by the Central Pacific Railroad Company so they have always heard him state. He cannot say or recall whether the assistant engineer was paid by the Pacific Improvement Company or the Central Pacific Railroad Company and does not know where the Pacific Improvement Company secured the funds used in the construction of this railroad, and he has no idea of the approximate cost of the construction

of this railroad from Delta to the northern boundary line of the State of California and from the northern boundary line of the State of California northerly to Ashland. He knew, in a general way at the time, possibly in a specific way, but it passed from his recollection. These estimates that he made had reference to sub-contracts rather than the general work itself. Undoubtedly there was an estimate made of the entire cost of construction from Delta north to Ashland, this being the usual custom in advance of construction. He knows that he personally estimated quantities on surveys on the California and Oregon, that is on surveys, if he recollects rightly, between or through the Sacramento canyon as far as Sisson. His recollection is that he calculated the quantities in the earth work on that part before construction. This is situated north of Delta. He does not remember when he made the calculations excepting that it was sometime before its construction and after its location, in fact in his time, he calculated a great many estimates of quantities after the survey was made, preceding construction and he cannot recall any specific piece or time, except in a general way. He knew it was the general practice, he would not swear positively as to any piece except that he recalls some work in the vicinity of Sisson, south of that, probably in his general duties work of making estimates and calculating probable cost of construction during the years 1886 and 1887, would come up. The actual final location of the railroad in the State of Oregon between Ashland and the southern boundary line of the State was run on

the ground by stakes, the location was actually finished in 1887 antedating construction. Actual location of a portion of the line was antedated, as he remembers it, the actual construction probably a short time, how short he could not say, he knows the locating party was, in 1887, making final location quite frequently at the last moment the actual location had been changed as they would put in what they called a "D" line, that is some little change to lessen a cut, or go around a rock point, or something of that kind. He has no personal recollection of the market value of the capital stock of the Central Pacific Railroad Company during the year 1887, knows nothing about it. He does not know in detail concerning the ownership by the Pacific Improvement Company of the capital stock of any other corporation, and does not know what constituted the general assets of the Pacific Improvement Company during this time.

Whereupon on re-direct examination the witness further testified that he knows in a general way that the Pacific Improvement Company was interested in and became a purchaser of large bodies of land adjacent to or through which these railroads would be subsequently constructed during a period of time before construction, out of which they made town sites and conveyed rights of way to the Railroad Company and in that way they would convey a right of way through these lands and the Railroad Company and the Pacific Improvement Company would be interested in the town

sites that would be subsequently developed by reason of the construction of the railroad. Occasionally the Pacific Improvement Company, in order to get right of way, would have to buy a whole ranch; that is unless they condemned the right of way, occasionally they would buy the whole ranch, deed the right of way and depot grounds to the Railroad Company and keep the remainder. He could not say how large an acreage the Pacific Improvement Company owns at the present time at Del Monte and Pacific Grove, it was several thousand acres the last he knew of it. He knows they owned the Point Pinos, Pescadero and Laureles ranches and the Del Monte grounds and that they had built a tourist hotel of large proportions at Del Monte and have maintained and operated that for a good many years and that they owned practically all the lands on the peninsula where Pacific Grove was laid out, and sold practically all the town lots in the town of Pacific Grove; that they have a 17-mile drive through their forest to Cypress Point on the ocean, leading off from Del Monte and have other lands throughout the State. The railroad never had any connection with these properties that he knew of. Since the Pacific Improvement Company moved its offices from Fourth and Townsend January 1st, 1895, they occupied some rooms in the Union Trust and some rooms in the Crocker Building, but a few years after that their offices were entirely in the Crocker Building, apart from the Union Trust Company building and apart from any building that had any connection with the Southern Pacific Com-

pany offices. Horace G. Platt became president of the Pacific Improvement Company, with offices in the Crocker Building, and Richard Derby was manager of the Pacific Improvement Company, succeeding Douty and after the death of Derby A. D. Shepard became and still is manager. Neither of these gentlemen had any connection with any of these railroads. The Pacific Improvement Company removed its offices from the building at Fourth and Townsend on the first day of January, 1895. The Pacific Improvement Company and the Southern Pacific Company were in the same building afterwards, that is in the Union Trust Building, situated at the corner of Market, Montgomery and Post, and they were there until 1898, when the Pacific Improvement Company moved across to the Crocker Building. The Railroad Company, at a later period moved as an entirety to the Merchants Exchange Building on California Street in San Francisco and had offices in the Hobart Building and in the Wells Fargo Building previous to that time and at these times the Pacific Improvement Company had no offices in these buildings, after 1898 when the Pacific Improvement Company moved into the Crocker Building. From 1894 to 1898 part of the offices of the Pacific Improvement Company were in the Union Trust Building and part of the offices of the Southern Pacific Company were in the same building but after 1898 they did not occupy the same building, that is his recollection. The offices of the Pacific Improvement Company at the present time (August, 1912) are in the Crocker Build-

ing, San Francisco, and have been since 1894 in part and entirely since 1898.

Whereupon upon re-cross examination the witness further testified that the Pacific Improvement Company acquired in a number of instances tracts of land along the proposed lines of railroad of these Southern Pacific constituent companies and afterwards platted them into town sites and handled them as such. The Central Pacific Railroad Company did not own townsites along its line nor did he know of the California and Oregon Railroad Company, afterwards consolidated with the Central Pacific Railroad Company, owning any townsites on the line. He presumes that the Railroad Company had the right to designate where townsites should be located along the line of railroad. Explaining why the Pacific Improvement Company was permitted by the Railroad Company to acquire the townsites and then subsequently give it the benefit of these townsites, witness testified that the Pacific Improvement Company bought the land and deeded the right of way to the Railroad Company, laid out the land into townsites which it had purchased and sold it. The Railroad Company could have located the townsites where it saw fit, or individuals could have gone and bought a piece of land and if it was a natural site for a town, built a town on it and got a side track put in by the railroad company, and got a townsite the same as the Pacific Improvement Company, which was done in different parts of the State of California. Down in the San Joaquin Valley, there are towns other than the

railroad towns. That is true in the construction of any new line of railroad.

Whereupon the witness further testified as follows:

"Q. But insofar as the railroad company itself might have availed itself of its opportunity to acquire townsites and secure the profit that would result from the sale of townsite lots, it did not do it, but the Pacific Improvement Company did it? Isn't that true?

A. I don't know of the Central Pacific Company engaging in any townsite business. In fact, I know there was one townsite proposition they had over in Alameda County.

Q. That antedated the organization of the Pacific Improvement Company, which was organized in 1878?

A. No, that was subsequent that they subdivided that—subsequent to the organization of the Pacific Improvement Company.

Q. Do you know whether the townsites along these railroads were all located on even numbered sections or not?

A. They were located on odd numbered sections and even numbered sections.

Q. Well, the Pacific Improvement Company had to acquire the odd numbered sections, if they hadn't been previously entered, from the railroad company, did it not?

A. It would have to acquire the odd sections, pro-

vided it was going through territory in which the land had been unsold.

Q. I say, which had not been previously entered?

A. Oh, yes.

Q. Now, you know the fact to be, do you not, that the Pacific Improvement Company actually took deeds for some of these townsites, if not several of them, from the railroad company itself, and afterwards platted the townsites, and made the profits that resulted from the sale of the town lots?

A. Yes, in some cases they got them from the railroad company, and others from other private proprietors.

Q. Now, can you explain the relation that existed between the Pacific Improvement Company and the railroad company, that induced the railroad company to turn over its own lands to the Pacific Improvement Company, to enable it to enjoy the profits resulting from the platting of townsites and the sale of town lots?

A. Why, they sold the land to the P. I. Company the same as they would sell it to any one else. The P. I. Company frequently paid large prices to the Central Pacific Railroad Company for the land.

Q. But the fact is that, not only the Central Pacific Company, but the other constituent companies of the Southern Pacific Railroad System, as it constructed its road under contract with the Pacific Improvement

Company, instead of platting the townsites along the line, sold the lands to the Pacific Improvement Company, and the latter company handled the townsites?

A. Well, that is, of course, where it fell upon a railroad section. There are a great many cases—for instance, the townsite of Sisson, townsite of Smithson, and other townsites on this particular California and Oregon line—where the Pacific Improvement Company acquired the land and laid out the townsite itself—bought the land. That is true of Montague, and Sisson, Delta and Smithson. The only townsite that that applied to was the townsite of Dunsmuir on that line—that is the only case. All the others were acquired by the Pacific Improvement Company by purchase, or by an agreement with the owner, who entered into an agreement with the Pacific Improvement Company in consideration of their putting a townsite on his land—they gave a deed to the Pacific Improvement Company, and took back an agreement by which they were to receive one-half of the net proceeds of the sales of the town lots. That was the general method with the Pacific Improvement Company. Most of their townsites were acquired in that way.

Q. Well, then, the Pacific Improvement Company was permitted by the railroad company to enter into contracts that would locate the townsites along the railroad?

A. Well, any person could have started a townsite as well as the P. I. Company.

Q. But they had to be located where the stations were established on the line of the railroad, didn't they?

A. Yes.

Q. So that it rested with the railroad company to designate where the townsite should be situated, governed, of course, by general considerations of the topography of the country?

A. Yes.

Q. But it was always optional with the railroad company to change the location of the townsite?

A. Oh, the railroad, of course, could change the townsite if it pleased anywhere—put it on top of a mountain or down in a swamp—but there were certain physical conditions, of course, which they could not get away from, and frequently that land was owned by a private individual, who entered into a contract with the P. I. Company, or started a townsite of his own."

STIPULATION.

Whereupon it was stipulated between the parties that other witnesses, employes, officers or custodians of the records of the Southern Pacific Company and Central Pacific Railroad Company, parties to the agreement Exhibit No. 1 of the answer, would, if called, corroborate the testimony of the witness Cumming that they had made a search and had been unable to find the original of said Exhibit No. 1 to the answer and such search would show that the original could not be found.

Whereupon C. P. LINCOLN, called as a witness on behalf of defendants, and being duly sworn testified, that he is head clerk in the Auditor's office and as such has custody of the corporate accounts of the Oregon and California Railroad Company, which he received from the Secretary George H. Adams through J. L. Wilcutt in September, 1904; from that time Wilcutt has had the custody; witness was in direct charge of the books from September, 1904, until August, 1912, but until May 10, 1910, they were in the custody of Mr. Wilcutt, when they were transferred to Auditor McDonald. Witness has kept the books posted, making monthly statements therefrom personally. That balance sheet, Defendant's Exhibit 286, as of February 11, 1912, shows the outstanding bonds under the mortgage to the Union Trust Company of July 1, 1887, and also the capital stock. They aggregate thirty-six million dollars practically and that bears a close relation to the cost of the properties. There are four million dollars additions and betterments, making forty million dollars that is shown. The four million dollars is not capitalized. But this thirty-six million dollars, the cost of the property, is practically the face amount of the stocks and bonds outstanding as shown on this exhibit. This exhibit, which is a correct reproduction of the books of corporate accounts of the Oregon and California Railroad Company for the eleven months ending May 31, 1912, has been verified and found to be correct by him from the books of the company. Whereupon defendants offered this balance sheet, marked Defendants' Exhibit 286, in evidence, whereupon the following col-

loquy occurred between counsel for the parties:

"Mr. Townsend: Government objects to the introduction of Defendants' Exhibit 286, upon the ground that the same is incompetent, irrelevant and immaterial. It is merely a copy of the records carried by the company, and does not import any verity. The item as to cost of constructing the railroad is in no way vouched for, and the cost of construction is not an asset in any event. This document is purely hearsay and secondary evidence, and no foundation has been laid for the introduction thereof. This latter objection does not go to the question whether Exhibit 286 is a correct copy of the original of which it purports to be a copy, but does go to the question that the original itself is but a compilation of deductions and computations, and is therefore hearsay and not the best evidence.

Mr. Fenton: Would you require the company to produce the original blotters and the original vouchers that enter into these balance sheets?

Mr. Townsend: Well, I cannot concede the accuracy of that item "Cost and construction" unless I see upon what it is based.

Mr. Fenton: Counsel for the defendants desire to state at this time that, if the original blotters, vouchers and other documents upon which the corporate records of the Oregon and California Railroad Company are based, showing this Balance Sheet of General Ledger for eleven months ending May 31, 1912, are required to be produced or accounted for, the defendants would

be able to prove that all the originals were destroyed in the fire of April 18, 1906, and that the re-establishment of these corporate accounts is based upon official reports made to the Interstate Commerce Commission required by law, to the Oregon Railroad Commission at various times required by law, and copies saved in the New York Office, and that since April 18, 1906, the records have been carried forward in the same manner in original books of entry based upon actual transactions from time to time, and that the witness, if required or permitted, would so testify, and vouchers for which are in existence since April 18, 1906. Now, I ask the Government whether counsel would require us to go into this vast mass of testimony in detail, for the purpose of showing a summary of what the books now show, as evidence by this Balance Sheet 'Defendants' Exhibit 286?'

Mr. Townsend: I am willing to admit that this statement is a correct statement of the corporate assets and liabilities of this company as they have been carried in the books of the company from time to time; but I do not admit the accuracy of the items.

Mr. Fenton: That is to say, that the items represent money actually received or disbursed?

Mr. Townsend: Yes. I don't admit that the balance sheet of the corporation as to its asests and liabilities is competent evidence of the facts which it purports to state. I do not admit that as a matter of law, and I reserve my objection to the competency and relevancy

and materiality of the statement upon that ground. But I do admit that this exhibit, 'Defendants' Exhibit 286,' is a correct statement of the continued balance sheet as appears on the books of this corporation from the beginning down to the time that this purports to have been made.

Mr. Fenton: You dispense with the production of such books as we may have—they are here for your inspection—and to our accounting for the destruction of those prior to the fire of April 18, 1906?

Mr. Townsend: There is no necessity for proof on that point. I may want to examine the books personally."

Whereupon said Defendants' Exhibit 286 was received in evidence and is hereinafter set out and described and made a part of this statement of the Evidence and identified as such. Witness further testified that Defendants' Exhibit 286 was prepared about the first or second of July, 1912, that he prepared one of these statements every month and sent two copies to the New York office and one to the auditor. One copy is kept by witness in the Corporate Accounts Bureau. This exhibit is a correct summary from the original books of the Oregon and California Railroad Company, and correctly shows what it purports to show.

"Q. Now, if the $17,745,000 worth of bonds issued and outstanding had inured to the benefit of the Southern Pacific Company, would that balance sheet show what it does?

Mr. Townsend: Objected to as incompetent, irrelevant and immaterial, calling for a mere conclusion or opinion upon a matter that is not properly the subject of expert testimony.

A. That balance sheet would not show that.

Q. That is to say, if the $17,745,000 had been received by the Southern Pacific Company, this balance sheet would be entirely different?

Same objection.

A. Now, those bonds, the proceeds of the bonds were paid to some one for constructing a road, the balance sheet indicates. Whether the proceeds were paid to the Southern Pacific Company or not, that balance sheet does not show. They might have been paid to John Smith, if John Smith built the road, you see.

Mr. Townsend: That answer is objected to, upon the ground that the exhibit itself is the best evidence of what it purports to show, and the answer is but a mere conclusion upon a subject that cannot be proven by expert testimony."

Whereupon the witness further testified that Defendants' Exhibit 287 is correct according to the books of the company in the auditor's office. Whereupon defendants offered Defendants' Exhibit 287 in evidence, and in connection therewith offered to prove, if required, loss of the records prior to April, 1906, and their re-establishment from the best sources available, and their actual record since that date based upon vouchers of ac-

tual daily transactions in the custody of the auditor, and verified by the witness, and that the witness would so testify, if necessary or required by the Government. Whereupon the following occurred:

"Mr. Townsend: This statement—this covers only transactions during April, 1911, is misleading.

A. This is April, 1911, but here is where it is carried forward right to since the beginning on this balance sheet. The balance sheet is a sumamry right from the beginning.

Mr. Fenton: Those statements or balance sheets are made every month, are they?

A. Made monthly.

Q. And what do you do with these monthly statements?

A. They are distributed to various officials—one to the deputy comptroller, one to the auditor, and several other officials receive them.

Mr. Townsend: The Government does not object to the introduction of Defendants' Exhibit 287 upon any ground relating to the question whether this is a correct copy of the balance sheet as it has been maintained from time to time by the railroad company; but it does object to the document on the grounds of its competency, immateriality and irrelevancy, and particularly on the ground that the balance sheet does not import verity.

Mr. Fenton: You don't require us to account for the loss of the original books or material upon which the

balance sheet is based, or to produce the original books and offer them in evidence, do you?

Mr. Townsend: There are some accounts that I wish to have examined; for instance, the account of taxes—I think that should be itemized by year, so that we may see how much taxes were paid at the time this suit was instituted.

Mr. Fenton: Counsel for defendants offer to produce and furnish for Government counsel, if not to offer in direct evidence on behalf of defendants' case, at Portland, an itemized statement showing the taxes paid each year, as far as it is possible to do so from the records that have been preserved from the fire, bringing the showing down to and including March 15, 1912, the date when the last payment of taxes was required to be made, under the laws of the State of Oregon.

Mr. Townsend: I also wish the same itemization as to the accounts of examination and appraisal of lands, salaries and expenses—general offices, salaries and expenses—miscellaneous, and law expenses.

Mr. Fenton: That can be made since 1906. The disbursements prior to that date I do not believe can be itemized, as the books containing the items have been destroyed. But since that date we will undertake to comply with the request of the Government's counsel, and have them ready at the Portland hearing.

Mr. Townsend: I also would like these itemized accounts by years to state with more particularity what ex-

penses enter into these general items. I do not ask for each specific item, but to classify the items with more particularity than appears here, so we may know.

Mr. Fenton: We will offer to do that from the books since April 18, 1906. I will have the transcript of your requests furnished to Mr. Lincoln, account officer, and try to produce this at the hearing at Portland.

Mr. Townsend: Now, with that general understanding, the Government will reserve the question of requiring the production of the books and vouchers upon which this statement is based until the compilation just requested is furnished to counsel for the Government. I assume that it will cover it.

Mr. Fenton: Defendants' counsel desire the record to show that all the books of the Oregon and California Railroad Company now in the offices of the auditor in relation to this matter are open to examination of any representative of the Government, and the books are in part now present, and counsel is at liberty to avail himself, by himself in person or by his representative, of the inspection of these books for any purpose, at his convenience between now and the Portland hearing." Whereupon said Defendants' Exhibit 287 was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified as such.

Whereupon the witness further testified that he had checked up Defendant's Exhibit 288 and verified the

same with the records of the auditor of the company and the figures shown in that exhibit are correct according to these records. Whereupon counsel for complainant objected to the same as immaterial and irrelevant, which said Defendants' Exhibit 288 was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified herein as such. Whereupon the witness upon cross examination testified as follows:

"Q. Mr. Lincoln, there are a number of items in this balance sheet, such as law expenses, examinations and appraisals, and other items which were incurred by the company because they were endeavoring to sell the lands other than "to actual settlers in quantities not exceeding one quarter section and for a price not exceeding $2.50 an acre," are they not?

Mr. Fenton: Object to that, for the reason that there is nothing in the account to show anything about sales at $2.50 an acre, or in excess of that, or in excess of 160 acres, and no segregation.

A. I cannot say. I cannot answer it.

Q. Well, can you explain why there should have been any expenses for examination and appraisals of the lands if the company had obeyed the law, and simply endeavored to sell them to actual settlers, in quantities not greater than one-quarter section, and for a price not exceeding $2.50 per acre?

Mr. Fenton: Objected to as an argument on behalf of the United States, and not an inquiry into the facts,

and a matter about which the witness could have no knowledge.

A. I cannot answer that.

Q. You cannot explain why examinations and appraisals of the lands were necessary if the railroad company had kept within the restrictions imposed by the granting act?

Mr. Fenton: Objected to as calling for a conclusion of law to be tried in the case, and the witness cannot testify as to the conclusions of law.

A. I cannot, no, sir."

Whereupon witness further testified that he does not know what the assessed valuation for taxes was based on and has no personal knowledge as to the accuracy of the items contained in Defendants' Exhibit 286, except that he found them upon the books of the company. Witness did not state that this statement shows that the bonds issued by the Oregon and California Railroad Company, secured by the mortgage of July 1, 1887, did not inure to the benefit of the Southern Pacific Company. The balance sheet does not show to whom the bonds were paid. They may have been paid to any one who built the road. Witness is not familiar with the contract of March 28, 1887, entered into between the Southern Pacific Company, the Pacific Improvement Company, the Oregon and California Railroad Company, the Union Trust Company, and the so-called London Bondholders' Committee, and Frankfort Bondholders' Committee. Wit-

ness does not know whether the bond issue under the mortgage of July 1, 1887, and payment of which was guaranteed by the Southern Pacific Company inured to the benefit of that company or not. There is nothing to show that they did or did not inure to the benefit of the Southern Pacific Company, according to that balance sheet. It does not indicate whether the bond issue of July 1, 1887, was used by the Southern Pacific Company to buy a former bond issue. It shows four million dollars expended for additions and betterments that have not been capitalized yet, in other words that the road cost over forty millions of dollars and they have only got about thirty-six million dollars for the capital liabilities, which shows it paid for those betterments, if not out of earnings, that they advanced the money for those betterments, and that they were essential and necessary, and that the Oregon and California Railroad Company has never capitalized that at all. The money for those betterments and additions has been advanced by the Southern Pacific Company to the Oregon and California Railroad Company to pay for those betterments and additions in accordance with the terms of the lease. He does not mean to testify that the lease provides that the Southern Pacific Company shall advance money to the Oregon and California Railroad Company, or that the Southern Pacific Company itself shall make the additions and betterments. It is in the third paragraph of Exhibit "G," at the bottom of page 147 of Government's Exhibit "G" in the bill. When it comes to settlement, "Provided, however, that if at the time, viz.: Such 1st day of May

when such balance of such income or rental is provided to be paid to the party of the first part, there shall be any such sum due or owing from the party of the first part to the party of the second part, for or in respect of advances or payments theretofore made by the party of the second part, or for new additions or improvements to the demised premises, or any part thereof," that covers it, the Southern Pacific Company deducts that advance before it makes the settlement with the Oregon and California Railroad Company, indicating that the Oregon and California Railroad Company pays the betterments. The second item in Defendants' Exhibit 286 reads: "Additions and betterments $4,131,296.40 represents money expended by the Southern Pacific Company for additions and betterments under the terms of the leases set forth in the bill of complaint in this case."

Whereupon **ROBERT ADAMS**, called as a witness on behalf of defendants, and being duly sworn, testified, that he is Assistant Auditor of the Southern Pacific Company, and resides in Oakland, California. That the Defendants' Exhibit 269 is a correct summary taken from the books of the company. Whereupon defendants offered said Exhibit in evidence, to which counsel for complainant objected as immaterial and irrelevant, upon the theory that the amount of money received by the railroad company from the sale of lands, and its expenditures, is not material to the issues in this case, but the Government did not object that Defendants' Exhibit 289 is a correct transcript of the books of the company, but does object to general compilations and balance

sheets as evidence, but admits the loss of documents heretofore referred to as similar evidence, which said Defendants' Exhibit 289 was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified as such. Whereupon witness further testified that statements of the Oregon and California Railroad Company, Forms 77 and 78, for the month of March, 1906, had been sent to the Eastern offices. These statements showed the transactions for the month of March, and cumulative from these statements the records of the company were started; that is to say, the statements that had been made from the books of the Oregon and California Railroad Company which were in existence prior to April 18, 1906, had been forwarded to the offices of the company at Omaha and New York, and these statements were based upon the books of the Oregon and California Railroad Company that were destroyed, and that is why the statement "Defendants' Exhibit 289," since April 1906, is made up from the records of the Oregon and California Railroad Company that are now in the custody of the Auditor and kept here. Defendants' Exhibit 288 is a correct statement of the transportation of Government freight and passengers for the five years 1906 to 1910, inclusive.

Whereupon, on cross examination, witness further testified that Defendants' Exhibit 289 is made up in the following manner: It has been the custom to render monthly reports, showing a general balance sheet of the Land Department business, at the end of each month,

and which reports were cumulative, showing all transactions down to the date of the report; that report was compiled from the detailed records of his office, and the report of March 31, 1906, was sent to the New York office and the Omaha office, and after the destruction of his other records, these reports were used for the purpose of continuing that balance sheet, and the only possibility of error is between the first day of April and the 18th day of April, 1906, the day of the fire, and with that exception he feels confident to vouch for the general accuracy of this present balance sheet, Defendants' Exhibit 289, and the statement is correct.

Whereupon Defendants' Exhibit 289 was received in evidence and marked "Defendant's Exhibit 289" and is hereinafter set out and described and made a part of this statement of the evidence and identified as such.

Whereupon, on redirect examination, witness further testified that he had prepared a statement, Defendant's Exhibit 290, showing the financial account between the Southern Pacific Company and the Oregon and California Railroad Company under the lease of July 1, 1887, and the succeeding lease of August 1, 1893, showing receipts and disbursements by fiscal years down to and including June 30, 1912; that the statement was prepared from the general books of the Oregon and California Railroad Company, starting with the balance as of June 30, 1905, and then gives in detail all entries on the books from that date to June 30, 1912. Whereupon defendants offered said exhibit in evidence, to which counsel for complainant objected upon the same grounds as

were urged as to Defendants' Exhibits 286 and 287, but no objection was made because of the failure to produce the original books from which said exhibit was transcribed, the Government admitting that this is a correct copy of these books. Whereupon said statement was received in evidence, marked "Defendants' Exhibit 290," and is hereinafter set out and described and made a part of this statement of the evidence and identified as such.

Whereupon, the witness further testified that he had prepared a financial statement showing the account between the Oregon and California Railroad Company and the Union Trust Company from July 1, 1887, under the mortgage of that date, showing receipts and disbursements on account of land sales so as to show the actual disposition of the proceeds of sales of lands and the income from lands, and this statement is prepared from the books of original entry of the company, and is a correct statement from July 1, 1887, to the close of June, 1912, showing all transactions.

Whereupon defendants offered said statement in evidence and marked "Defendants' Exhibit 291."

Whereupon witness further testified that he knows that the statement from the trustee shows the payment of the sum of $300 marked as "Paid to John M. Gearin," and $713.41 "Paid to Dolph, Mallory, Simon & Gearin" for expenses in connection with this litigation, which said Defendants' Exhibit 291 was received in evidence and so marked, and is hereinafter set out and described

and made a part of this statement of evidence, and identified as such.

Whereupon witness further testified that the item of $3,062,364.80 is in the statement as of June 30, 1912, but the details of the expenses and taxes are shown in the exhibits more in detail. They will not check with this, for the reason that these statements are of April, while this statement—Defendants' Exhibit 291—has been brought down to June, 1912, but the expenses for the subsequent months are similar to those as shown in detail on those statements. From that statement—Defendants' Exhibit 291—the Oregon and California Railroad Company had paid to the Trustee, Union Trust Company, up to June 30, 1912, $2,497,713.01, as shown in the second part of the statement, "cash paid over to Trustee as per previous statement." That statement means that the Oregon and California Railroad Company had paid over to the Trustee, the Union Trust Company, the amount of $2,497,713.01. The lower part of the statement, "Statement of application of cash receipts by Trustee to date," shows again the amount paid over, the "interest allowed by Trustee on cash deposits, $51,523.87," and then the use of that fund—"Paid for 2255 called bonds, $2,245,075. Paid for accrued interest on called bonds, $51,175." Certain other expense, and the "cash in hands of trustee unapplied," as of June 30, 1912, $242,859.76. The statement of $3,062,364.80, in the upper part of this Defendants' Exhibit 291, showing a total of $4,603,250.82, means that during the period of this litigation, or for the past

three years or more, that the company, Oregon and California Railroad Company, has paid taxes and other expenses; that is, that the sum of $4,603,250.82 represents the total cash received by the Oregon and California Railroad Company from May 13, 1887, to June 30, 1912, from all sources, as shown by the first part of the statement. Of that amount it paid to the trustee $2,497,713.01, and the balance is the amount that has been paid for expenses and taxes during the period of the last three or four years—how long, he does not remember. The lower part of the statement shows that the advances by the Oregon and California Railroad Company for expenses and taxes were $956,826.99, and according to this statement this item of $956,826.99 represents advances by the Oregon and California Railroad Company for expenses and taxes; that is, the Oregon and California Railroad Company would still owe the Union Trust Company under this mortgage $1,540,886.02; that is to say, the Oregon and California Railroad Company has received from all sources on account of the trust fund from May 13, 1887 to June 30, 1912, $4,603,250.82, $1,540,886.02 is really reduced by the amount $956,826.99 advanced by the Oregon and California Railroad Company, as shown in the lower part of the statement. He has brought with him samples of the blanks, showing the transaction as it is handled through the accounts and reports made to the trustee.

Form 215 O. & C., which is a statement made to the Union Trust Company of New York, is prepared monthly, shows the contract number, name of purchaser,

description of land sold, number of acres, price per acre, and the consideration, and is signed by the land agent of the Oregon and California Railroad Company and the Vice-President of that company. Form 216 O. & C. is the memorandum of contract made for sale of land, shows the date of contract, name of purchaser, residence, description of tract, the number of acres, and price per acre, and the amount, and the terms of payment under the contract. This is certified as correct by the land agent of the Oregon and California Railroad Company. Form 217 O. &. C. is statement made to the Union Trust Company of New York, of land sales and collections, monthly statement showing the date, name of purchaser, contract number, and the principal and interest, and new sales during the month.

218 O. & C. This is made to Union Trust Company of New York, Trustee under Indenture dated July 1, 1887. This shows the date of the collection, contract number, whom it is collected from, stumpage and depredations, land leases, expenses and taxes refunded, and other collections—what for and the amount, and to what account credited. Form 219 O. &. C. is statement of land contracts cancelled. This is made to the Union Trust Company of New York, monthly, shows the contract number, name of purchaser, description of land, and amount of principal cancelled, and the amount of interest cancelled during the current month and from May 13, 1887, to the beginning of current month, and total cancellations from May 13, 1887, to end of current month. This is certified as correct by the Land Com-

missioner. Form 220 O. & C. is an abstract of disbursements made monthly to the Union Trust Company of New York, shows the date of voucher, voucher number, issued to, what for, and the amount. It is signed by the Land Commissioner and vice-president, subscribed and sworn to before a Notary Public for California and for Oregon. Form 221 O. &. C. is the monthly statement of account with the Union Trust Company of New York, showing the cash receipts, expenditures, Union Trust account with the Oregon and California, and statement of application of cash receipts by trustee. Form 222 O. & C. is monthly statement to the Union Trust Company of deeds authorized for execution by Board of Directors, showing the deed number, contract number, issued to, date of final payment, principal, interest, interest cancelled on anticipated payments, net interest collected on contracts, interest collected on overdue payments, total. This is signed by the Land Commissioner and subscribed and sworn to before a Notary Public for California. Form 223 O. & C., certified copy of resolution of Board of Directors. This is a statement to the Union Trust Company of New York, being certified copy of resolution of Board of Directors authorizing the execution of deeds on the part of the Oregon and California Railroad Company; shows deed number, grantee, description of land, and the consideration. It is signed by the Secretary of the Oregon and California Railroad Company.

Whereupon, defendants offered in evidence these forms as Defendants' Exhibit 292, which was objected

to by complainant as immaterial, and the same was received in evidence and marked "Defendants' Exhibit 292," and is hereinafter set out and described and made a part of this statement of the evidence and identified as such. Whereupon witness further testified that he had prepared another table or statement outlining the manner of handling cash receipts and the movement through the records, and refreshing his memory from this memorandum which he had made, stated the course of business as follows: The application to purchase, with the remittance, is sent to the assistant treasurer in San Francisco. The same report, or application to purchase as it is known, is then sent to the auditor, and the money received thereon is reported. Third, the application to purchase is entered in the record of contracts and record of land sales books, and then sent to the Land Commissioner to have the contract prepared. Fourth, the remittance reported by the assistant treasurer is applied to the purchase account in the record of contracts book, and receipt therefor issued. Fifth, auditor advises land commissioner when contract is paid in full. Sixth, land commissioner prepares deed for contract. Seventh, deed is sent for execution and release by the trustee. Eighth, deed when returned from trustee is delivered to the grantee. Ninth, sales and income from lands are credited to an account styled "Proceeds from Sales of Granted Lands." That is the bookkeeping course. That this was the bookkeeping process, and that these receipts as the proceeds of sales, income account, are credited on the auditor's books of the com-

pany. They are first entered on the treasurer's books, and the postings made to the auditor's books from the treasurer's cash record, and that covers the total. The net amount is what has always been paid to the Union Trust Company, that is, the receipts less expenses and taxes. Instead of sending the gross receipts to the Union Trust Company, out of the gross receipts is paid the expenses and taxes, and the net amount is sent. The trust fund is charged with these expenses and taxes. The relations of the United States and the company in the transportation of freight and passengers between Roseville Junction, in the State of California, and Portland, Oregon, on the line of this road constructed under the Act of July 25, 1866, as to Government transportation of property and passengers, are, that such property and passengers are handled free to the Government over that part of the line, and it is known in the requisitions made by the United States, and called "Free Land Grant Road." This free movement applies to all shipments from any part of the United States that may be received and carried over that portion of the mileage, except United States mails. Witness thinks there is no other exception. It would and does apply to transportation of troops of the United States. He knows that from August 1, 1902, freight and passengers have been handled without cost to the Government, or free, over that line, and from his recollection of the records of what was done prior to that time, and from information furnished by men who have been in the office for a great many years and handled that line of business con-

tinuously for thirty-five or forty years, during the earlier years, the business was very heavy. He says the earlier years—for a period, he thinks it was during the Spanish-American-Cuban war, it was very heavy over that line, but what is the practice now has existed during the life of the entire operation of the property, and he would say that it was understood that a statement had been filed in an Oregon case at one time which showed a very large volume of business handled over that line during the early days, but he has not been able to duplicate that statement in the office. It was thought possibly it was at Portland or at Salem. He refers to a statement from the Auditor's office prior to the fire, and thinks it was in 1904, as recollected by Mr. Sherburne, who has handled the business for years, that he had had the statement prepared. He tried to refresh his memory, but could not. In regard to the freight matters, there is an exhibit in the case covering the transportation subsequent to the fire, but prior to the fire it is a matter of recollection.

Whereupon, on cross examination, witness testified that he was assistant auditor for Southern Pacific Company; had been with that company for ten years last past, but assistant auditor for about three years; before that, auditor of disbursements. He was promoted from disbursements department to assistant auditor. He commenced work with the Southern Pacific Company in 1902. Prior to that time he had never been employed by the Southern Pacific Company or any of its allied or subsidiary corporations, or by the Union Pacific. He

was employed on the Chicago & Alton Railroad, which is not considered a Harriman line. He was first employed by the Chicago & Alton, then by the Southern Pacific Company. He was with the Illinois Central for about two years. The auditor's office is located in San Francisco, as is also that of the general auditor of the Southern Pacific Company. While the Southern Pacific Company is a Kentucky corporation, its operating and administrative offices are at San Francisco. The chief executive office is located at San Francisco; that is, the President of the road, and the other officers are located there. It has also an office at New York. It is a fact that the Southern Pacific Company operates a number of companies under lease, and he thinks it is the principal stockholder of these companies from which it holds leases, and believes that the Southern Pacific Company practically owns all of the stock of the Oregon and California Railroad Company. His duties relate to the accounting department of the Southern Pacific Company, and that includes the operation of all these roads that comprise the system of roads operated by the Southern Pacific Company.

Q. Now, have any of these companies from which the Southern Pacific Company holds a lease, a separate accounting division, or does it all pass through the one accounting division?

A. No, the accounting organization would take care of the corporate accounts of the Oregon and California Railroad Company, for instance.

Q. Yes, but it is all one general accounting division, with separate books for each of the companies whose accounts you keep? Isn't that true?

A. Well, no, not that way; I think I can clear that up; that each company keeps its own books, that is, its corporate accounts, from which this statement, for instance, is prepared, of the Oregon and California Company. But the operating accounts, revenues and expenses, from the operation of the Oregon and California, or the Central Pacific, or the other companies, are all handled in the one office and by the same force of men—of course, distributing the earnings and expenses to each company—which could not be handled otherwise very well.

Q. Well now, you said that where lands were sold, for instance, the moneys received were paid to an assistant treasurer?

A. Yes.

Q. What is his name?

A. The present treasurer is H. A. Jones, assistant treasurer.

Q. He is assistant treasurer of what?

A. He is assistant treasurer of the Southern Pacific Company.

Q. Now, is it not true that all of the constituent companies of the Southern Pacific system, their funds are paid in to that same man, this same assistant treasurer?

A. That is correct.

Q. And the Southern Pacific organization there acts as a sort of a clearing house for all of the constituent companies of this railroad system?

A. The Southern Pacific Company handles the accounts and the affairs of the other companies, and distributes through their accounts to each corporate company the revenues and the expenses. You might call it a clearing house.

Q. That is only by way of analogy. I do not mean it is technically correct.

A. Yes, that follows the idea.

Q. So that the receipt of moneys from the sale of the lands which were granted by these two acts of Congress involved in this case, is by the assistant treasurer of the Southern Pacific Company, and then the accounting department of the Southern Pacific Company disburses it, and credits it, and charges it where it belongs?

A. The assistant treasurer shows on his books that the amount was received from a certain source, and to be applied to a certain source—his records show that; and the accounting department abstracts his records distributing the amount accordingly.

Q. Now, from whom do you get instructions as to the distribution of these moneys—these receipts and disbursements?

A. The statement that is received with the receipt will show that it is to be applied on the sale of a certain

piece of land, for instance, land of the Oregon and California Company, or the Central Pacific Company, or what not, and that amount is checked, of course, and the credit applied accordingly.

Q. Well, the Southern Pacific Company acts as a sort of a banker for all of these constituent companies, doesn't it, receiving the moneys of the various companies, and disbursing them?

A. That is correct. It receives the money, and disburses it or accounts for it.

Q. Now, the moneys of these constituent companies are disbursed upon the authority of what office?

A. On the authority of the officers of the Southern Pacific Company; or in the case of the land department, on authority of the land commissioner—the Oregon and California land commissioner.

Q. Well, there is one officer who acts as land commissioner for all of the constituent companies, too, is there not?

A. I would not be positive as to that, whether he is land commissioner of all or not. I think at the present time that Mr. McAllaster is land commissioner of the Oregon and California Railroad Company, yes.

Q. And of the Central Pacific?

A. I could not say as to that. I believe that he is, but I would not be positive as to that.

Q. Well, that is already in the record, so if you

have no personal knowledge, I will not question you about it.

A. No, I don't know.

Q. Then, it is a fact, is it not, that the Southern Pacific Company determines what shall be done with the moneys received from the sale of Oregon and California Railroad Company lands?

A. I would say no, that the Southern Pacific Company does not; that it is disbursed in accordance with the terms of the agreement.

Q. I will ask you to examine defendants' exhibit 290. State if that does not show that the Southern Pacific Company does disburse the moneys and renders monthly accounts showing how it has disbursed it.

A. No, this statement is prepared from the books of the Oregon and California Railroad Company that are kept by the accountant who has charge of the corporate accounts of the Oregon and California Company.

Q. Well, isn't this also kept in the books of the Southern Pacific Company?

A. No. No, this is taken from the books of the Oregon and California Railroad Company.

Q. Do you mean that the Southern Pacific Company has received and disbursed these many millions of dollars, and has never kept any record of it?

A. No, I don't mean that, no. Of course the Southern Pacific Company keeps records of all receipts

and disbursements. But this statement which we have here is a statement prepared from the books of the Oregon and California Railroad Company. The Southern Pacific Company books will show the same information, of course.

Q. Well, that is just what I am getting at. These same items appear in the books of the Southern Pacific Company, do they not?

A. Why, most of them, yes; most of these items; yes, most of them. For instance, I find here, showing the earnings and expenses of the Oregon and California Railroad Company for this period to June 30th, that these earnings come from the operation of that railroad, and they will appear in the Southern Pacific accounts.

Q. That is, the totals, or in detail?

A. They will appear there in detail, and of course in a great deal more detail than on the Oregon and California books.

Q. Because the Southern Pacific Company is the operating company?

A. The Southern Pacific Company is the operating company, yes.

Q. Now, by this it appears that the Southern Pacific Company carries a general cash account with the Oregon and California Railway Company, in which is charged all moneys received by the Southern Pacific Company on account of land sales, receipts from transportation, and from all other sources, in one general

cash account, and in the same account there is credited to the Southern Pacific Company the amounts that it has expended?

A. Just a moment, please—in one general cash account. I don't grant that.

Q. Well, one general account? Eliminate the word cash—one general account between the Southern Pacific Company and the Oregon and California Railroad Company? Well, I will use your own language, "In general account." That is correct the way you drew this up, isn't it?

A. Yes.

Q. There is such an account, "Southern Pacific Company in General Account with the Oregon and California Railroad Company?"

A. Covering everying, the entire transactions between them.

Q. Yes. And the Southern Pacific Company receives all the cash and disburses all of the cash, charging itself with what it receives and crediting itself with what it disburses? Isn't that true?

A. That is correct, yes, sir.

Q. Now, do you know whether, when the Southern Pacific Company makes an expenditure, for instance, for taxes on these Oregon lands, whether it receives any authorization from the Oregon and California Railroad Company officers to make that disbursement?

A. Taxes on the Oregon land?

Q. Yes.

A. Why, those taxes are taken care of by the Oregon and California Land Department.

Q. You say is taken care of?

A. Yes. They would check up, prepare the voucher and everything for payment.

Q. That is simply to convey to the officers of the Southern Pacific Company the information as to the amount of taxes, isn't it?

A. Why, it is to pass it through the accounts and through the treasurer for payment, but the entire work and everything in connection with it is done by the Oregon and California Land Department, not by the tax agent of the Southern Pacific Company. He knows little or nothing about it.

Q. Are you sure about that?

A. Why, I would be quite sure of it, because he does not handle such matters. If he does, why, I don't know anything about it.

Q. The tax agent of the Southern Pacific Company in the Wells Fargo Building here at Portland does not handle the subject of taxes?

A. I was thinking of the tax agent in San Francisco. I do not know what Mr. Eddy does up here.

Q. You would not deny the tax agent of the Southern Pacific Company located here in Portland does not attend to these tax matters here in Oregon?

A. I do not know as to that. No, I would not deny it.

Q. Do you know who it was that determined that the Southern Pacific Company should deduct the amount that it paid for taxes on account of these Oregon lands from the receipts from the sales of the lands?

A. No, I don't know, but I understood that was in accordance with the terms of the mortgage.

Q. Are you familiar also with the terms of the lease?

A. No, I cannot say that I am.

A. No, I am not familiar enough with that to answer any questions in regard to it.

Q. You cannot explain upon whose authority the expenses of maintaining the land department, and the taxes paid upon these lands, were deducted from the amounts that were turned over to the Union Trust Company?

A. No, I am not familiar with that at all.

Q. This exhibit 290 is not a detailed statement of the account but simply the monthly totals of the several items? Isn't that true?

A. Not altogether. If you will notice, we have given the items in considerable detail. For instance, there is sundry disbursements by San Francisco office during July, 1905, $4,454.82; land department, $4,382.-99; director's fees, $65.00; stationery, $6.83—$71.83

total. We have given enough of it all through all of these items, we have endeavored to make sufficient segregation to make the matter clear.

Q. But they are compiled by month, I say, rather than by individual item.

A. Yes, they are compiled by monthly entries, and where segregation was necessary to make clear, why, we have done that. For instance, there is July 31, "Coupons and Registered Bonds Interest paid by New York office during July, 1903, $422,050." Nothing more is necessary there to make that clear. But where it was, where the amount was made up of several items, we have divided it to give complete information. But when you take gross receipts, for instance, the amount there is gross receipts for the period—of course, there is no detail except showing the class—mail, express, freights, etc.

Q. Exhibit G of the bill of complaint, which is admitted to be correct by the answer, is the supplemental lease of August 1, 1893, between the Oregon and California Railroad Company and the Southern Pacific Company, which it is admitted by the pleadings is still in full force and effect, and has been since that date. This lease provides that the Southern Pacific Company shall pay, among other things, the interest upon the bonded indebtedness of the Oregon and California Railroad Company. Now, if that be true, why does the Southern Pacific Company charge the Oregon and California Railroad Company with the amount that it pays

pursuant to this lease?

A. I know nothing about it. It is a matter I have nothing to do with—I am not called upon to handle at all.

Q. Well, then, there is no way that you can assure us that any of the items of this exhibit 290 is correct, in the sense that it was an indebtedness owing by the one company to the other?

A. Oh, this is the record of actual transactions as handled through the books. There is no doubt that the statement is correct. But just why they do that, or the terms of the lease pertaining to the bond interest, I know nothing about that. I am not required to handle it, and do not handle it.

Q. Do you know whether there is charged in here $5,000 a year that is paid to the Oregon and California Railroad Company under the terms of the lease?

A. No, I don't find that in here.

Q. There is included, however, in this statement all items of construction and improvement, including new mileage, new railroad—isn't that true?

A. Yes; yes, the operating revenues and expenses and charges for the betterment and addition of the line of the Oregon and California Railroad Company.

Q. And this account starts out on June 30, 1905, with a balance in favor of the Southern Pacific Company of over six millions of dollars? That is true, is it not?

A. $6,338,936.79. And it closes on June 30, 1912, with that balance reduced to $2,542,721.18?

A. That is correct.

Q. And in addition to that reduction in the cash balance claimed by the Southern Pacific Company on June 30, 1905, there is the amount that has been invested in new railroad between those two dates as the net result?

A. In addition to that, you say?

Q. Yes.

A. No.

Q. What I mean is that the so-called deficit of over six million dollars has been reduced to a little over two million, and a large amount of money has at the same time been invested in new railroads and betterments and improvements?

A. Everything that has been invested in new railroads, betterments or improvements of the Oregon and California Railroad Company are in these figures.

Q. Yes, but what I am getting at is this: That the operation of this railroad and the receipts from the sale of lands, and the amounts that the railroad company has paid out, results in the reduction of a deficit of six million and a little over to a little over two million, and at the same time in the increasing of the total amount of the property as disclosed by your statement of assets—you have withdrawn that for the purpose of being corrected—but of several million dollars between those

dates—that itemized statement you had there; it had the word "Grants" instead of "Railroads."

A. No, this doesn't show that part of it.

A. In this statement?

Q. Yes.

A. Where do you find that?

A. Yes.

Mr. Tonwsend: You mean there has been no new mileage constructed since 1905 in the State of Oregon?

Mr. Fenton: That is included in this account.

A. Let's see. I wouldn't be sure about that.

Mr. Townsend: What about that, Mr. Koehler?

Mr. Koehler: Not that I know of.

Mr. Townsend: No new mileage since 1905?

A. It is possible that there have been some extensions of the line up there.

Mr. Koehler: That is not the O. & C.

Mr. Fenton: There has been no Oregon and California mileage constructed since 1905.

Mr. Koehler: I was thinking of that extension from Natron, but that is not O. & C.

A. That is from Natron down to Klamath.

Mr. Koehler: Yes.

A. That is separately incorporated. Yes, that is separately incorporated. But this shows, of course,

that the deficit of six million dollars has been decreased to two million five hundred and forty-two thousand.

Q. Take the item under date of August 31, 1905: "Sundry Disbursements by San Francisco Office during August, 1905, namely: Land Department $62,873.55." Do you know what that was for?

A. You mean generally what that was for, or the specific items? Of course, I haven't a statement.

Q. No, I mean specifically, why was that month so much larger than the others?

A. I don't know. I couldn't state as to that. I don't know why August is heavier than the other months —August 31, 1905, no, I cannot explain it.

Q. Has the Oregon and California Railroad Company a treasurer?

A. Mr. Jones, assistant treasurer, is treasurer for all these companies, handles the funds of the companies; he is treasurer of the Southern Pacific, the Oregon and California, the Central Pacific, the S. P. R. R.

Q. Did you ever see a check drawn on the bank account of the Oregon and California Railroad Company?

A. Never have.

Q. Has there ever been one that you know of?

A. Not that I know of.

Q. Mr. Adams, I notice in the statement of assets and liabilities of the Oregon and California Railroad

Company no reference to the land grant. Point out to me, if it be a fact, where it is listed there as one of the assets of the company. I refer to Defendants' Exhibit 286.

A. Nothing in here refers to the land grant specifically.

Q. Well, or otherwise.

A. Let us see. Land grant accounts and land trust fund. This covers the entire account of the Oregon and California Railroad Company, including the land matters.

Q. Where is there anything in here showing the lands listed as an asset of this Oregon and California Railroad Company?

A. This is a balance sheet.

Q. Doesn't this purport to be a statement of assets and liabilities?

A. Oregon and California Railroad Company balance sheet as of May 31, 1912, showing the capital expenditures and other matters pertaining to the accounts for that period.

Q. I said, does it not purport to be a statement of the assets and liabilities of the Oregon and California Railroad Company?

A. Yes, balance sheet.

Q. Now, the assets are made up of the items stated here, none of which include any of the lands still held

by the Railroad Company or claimed by the Railroad Company? Isn't that true?

A. Let me look at that again.

A. This is a balance sheet of the Oregon and California Railroad Company for the eleven months ending May 31, 1912, which shows the capital expenditures, cost of road and franchises, $36,791,228.12; additions and betterments $4,131,296.46; equipment $95,918.00.

Q. I ask the specific question whether there is any item there that includes the unsold granted lands still claimed by the railroad company, and which are involved in this matter?

Mr. Fenton: The defendants will admit that it does not include the railroad land grant, the acreage, or any valuation of that acreage. It does not purport to show it.

Q. That is true, isn't it?

A. There is nothing in this statement, no. This shows the capital expenditures and the current assets and liabilities referred to.

Q. Now, among the liabilities are included the outstanding bonds secured by the mortgage of July 1, 1887, stated here to be $17,734,000. That is one item of the liabilities, is it not?

A. That is first mortgage five per cent bonds of 1887. That is correct.

Q. And it also includes nineteen million dollars of capital stock?

A. That is correct.

Q. So that this statement shows the assets of the company to be $43,807,385.86?

A. The assets of the company as capital and—

Q. Well, that is the assets?

A. That is correct, yes.

Q. And the liabilities to be $44,143,631.93?

A. That is correct.

Q. So that, deducting the capital stock it shows the liabilities to be $25,143,631.93, and the assets to be as heretofore stated?

A. I don't get that. The capital stock is $19,000,000. Deducting that, I think you have the answer.

Q. Do you know where, if any place, in the books of the Oregon and California Railroad Company, or of the Southern Pacific Company, if at all, these unsold granted lands that are involved in this suit are inventoried or carried as an asset?

A. No, I do not.

Q. The railroad is carried as an asset at its cost, is it not?

A. At its cost, yes.

Q. Yes, but it is carried as an asset?

A. Yes.

Q. The only question is whether it should be carried at a valuation independent of its actual cost.

Q. You carry it at its actual cost in your books?

A. Yes, the books show the amount that was put into the railroad—the cost of construction.

Whereupon the witness further testified that he could not say in what form money is remitted to the Union Trust Company. That is handled through the New York office. The New York office conducts the transactions with the Union Trust Company and reports to him the payments made to the Trust Company, and these are entered upon his books. He does not know anything about the manner in which the prices for which the lands are sold are determined, but accepts the price approved by the land department. Part of his salary is apportioned to the Oregon and California Railroad Company, the same as the other officers who act for more than one company; their salaries and general office expenses are apportioned among the several companies which they represent. The leases of the companies provide for that. These expenses are all in the first instance paid by the Southern Pacific Company out of its funds, and charged against the company in the proportion which is agreed upon. The rules determine what proportion shall be charged against each company. These rules that are laid down by the commissions, vary. Train mileage, car mileage, road mileage, locomotive mileage, or some other basis is used which determines the value of the service to each company. The expenses of station agents and other employes located on the line of the Oregon and California Railroad Company are

charged to that company. The expenses of officers whose services and jurisdiction extend over more than one corporate property are distributed on the basis that will nearest cover the actual services performed for each. The passenger officials are distributed over corporate properties on a passenger train or car mileage; freight officials on a freight train or car mileage. The Commission of the State of Oregon have prescribed rules for apportioning salaries of officers whose jurisdiction extends over more than one state, and these rules are followed in distributing salaries and expenses in the State of Oregon. They state that the salary of an official whose services extend into some state other than Oregon shall be distributed on a mileage basis, or whatever other basis that in their judgment is considered just and equitable. The distribution of his own salary so far as the State of Oregon is concerned, is determined by the Railroad Commission of that state. The question of service performed for the land department is decided by the officials of the Southern Pacific Company. The accounting department would probably say to Mr. McAllaster, "How much of your services are chargeable to this company or to the Oregon and California Land Department, and how much to the C. P. Land Department?" That would receive consideration and very likely his recommendation would be considered. The auditor of disbursements considers the apportionment recommended by the man in charge. If Mr. McAllaster of the land department, recommends certain apportionment should be made of the salaries, that receives con-

sideration and final approval until such time as it is considered that there should be a change made in it. This auditor of disbursements is the auditor of the Southern Pacific Company. He performs services for all of the companies, and his salary is charged just the same as that of witness, to all of the other companies. He is subject to the general auditor of the Southern Pacific Company, who is subject to the President of the Southern Pacific Company. This distribution is determined by the executive officers of the Southern Pacific Company. Payments by the New York office and similar items are in this statement, and the item under August 31st, "Coupons paid by New York office during August, 1905, $30,625," is for interest coupons on the bonds. These items of payments by the New York office and similar items are the disbursements referred to by him as made direct by the New York office as distinguished from the other items in the statement. Explaining the statement—Exhibit 290—showing payments made to the Union Trust Company on account of land sales,—there is an item under January 31st on the first page, 1906, "Union Trust Company of New York, Trustee Mortgage, 1887, amount collected on Ida M. Eaton note and paid to Union Trust Company of New York by the New York office, $1,193.53," and on the next page under date of March 31st, an item "Payment by the New York office during March, 1906, (additional) $34,657.47, which is itemized as "Union Trust Company of New York, Trustee Mortgage of 1887, amount due from April-

October 31, 1905, $9,467.29. Amount due for November, 1905, $19,415.18;" that represents the monthly collections from the sales of land that were paid over to the Union Trust Company. That is taken up in the account of the month of March, 1906, and means that the actual turning over of the money was deferred these few months, so that while the money was paid in March, the item here shows that it was for the preceding months.

Q. Well now, dropping down to the bottom of that same page, under date of June 30th I find expenditures for the year ending June 30, 1906, as follows: "Construction, Henderson to Springfield $120,049.94; Construction and Improvement $537,649.67." Do you know whether that is new construction or simply reconstruction or betterment of the existing road?

A. Why, I could not be positive as to that, but I believe from the reading of it that it is what is known as additions and betterments to the existing line, although the first item, "Construction Henderson to Springfield $120,049," looks as if it was construction of a new line from Henderson to Springfield. The other item "Construction and Improvement $537,649," I think is improvements to existing property, for the reason that there are no other items in here.

Mr. Fenton: What is the date of that? I can tell you.

Mr. Townsend: It says for the fiscal year ending June 30, 1906. It does not give it any more specifically.

Mr. Fenton: There was a link between the Natron

branch and the main line from Henderson over to Springfield that might be called new construction. I don't remember the date. It connected the two lines. That is, the Woodburn-Springfield branch and the main line, Henderson being at a point near Engene.

A. I find on the statement for the year 1907 as follows: It reads, "Construction and improvements" and there it is divided between the betterments and additions, which satisfies me that this item in 1906, "Construction and improvements," is construction of additions and betterments to the operated line rather than new construction; that during the year 1906 we had some difficulty in dividing our new work between additions and betterments because of the records destroyed in the fire, so in some cases we had to lump them.

Q. Under date of June 30, 1907, I find the following items going into construction and improvement. The first item that you have just referred to "Account Construction Henderson to Springfield," $39,150.57 with an interest charge added amounting to $841.75, and then these other two items, namely, "Account betterments $621,580.83, account additions $277,625.50." What were those additions, if you know?

A. Those were additions made to the operated line. I can speak positively as to that, because all charges to these accounts additions and betterments are made in accordance with the classification as prescribed by the Interstate Commerce Commission.

Q. Would you include in additions additional ter-

minal facilities, switches or sidetracks?

A. Yes, or increased weight of rail, and there are a great many things. There is a classification prescribed that includes additions.

Q. How would you distinguish betterments from additions? Now, for instance, the laying of new rails, would you call that a betterment or an addition?

A. That is done for us by the Commission. The Interstate Commerce Commission prescribe rules stating what shall be an addition and what shall be a betterment to the property. But you and I, I think, will understand it if we say that it is an improvement to the operated lines. In one case it is considered an addition and in another a betterment. Just how I can explain that, it is not clear in my mind now. In fact, it it pretty hard for any one to understand just where they draw the line between an addition and a betterment; but it is an improvement to an existing property. An addition is a new building where none existed before; a betterment is enlarging that building or structure.

Q. The renewal of rails and ties as they are worn out is not put in as a cost of operation?

A. Yes; oh, yes.

Q. The replacing of worn out material then, is a cost of operation?

A. That is correct, yes, sir.

Q. That would be included in this general amount which I find at the end of each year for the total of the

fiscal year?

A. Operating expenses, yes, sir, except that the Interstate Commerce Commission have prescribed rules governing as to what shall be considered an operating expense and what shall be considered an addition or betterment to the property, so that the rules of the Commission have been strictly observed, of course, in arriving at these figures.

Q. That is true with reference to this particular statement, exhibit 290, is it?

A. Everything, yes.

Q. That the distribution of those items has been as nearly as you could in accordance with the rules of the Interstate Commerce Commission?

A. Yes, just as closely as we could follow it.

Q. On page 12, under date of June 30, 1911, you will see also charged $33,080.22 for construction of motor car line—Ashland, Oregon. That of course is new construction.

Mr. Fenton: No.

Q. Do you find it?

A. Yes, sir.

Q. It says, "Expenditures during year ending June 30, 1911, motor car line—Ashland, Oregon, construction."

A. I don't know what that item is, whether that is a new line or whether it is reconstruction of an old

line. We have done a great deal of that work in Oregon and California.

Q. Under date of June 30, 1911, on page 12, the second item "Interest on open account with Southern Pacific Company for year ending June 30, 1911, $310,-892.40." What is that?

A. That is interest on cash advanced to the Oregon and California Railroad Company that year.

Q. Well, that is this balance of credit that is carried in favor of the Southern Pacific Company on this statement from time to time, isn't it? For instance, it starts out with a cash credit at the very beginning of the statement, $6,338,000.

A. Oh, no, no. The Southern Pacific Company advanced money, you will find down here. Take this year, that motor car line Ashland construction, addition and betterment $378,032.25. To betterments $206,-011.82 and other amounts that have been advanced to the Oregon and California Railroad Company, and the interest is computed on those advances.

Q. Well, then, you mean that every investment that the Southern Pacific Company makes of its moneys, in betterments and improvements on the Oregon and California Railroads, carried as a continuing indebtedness by the Oregon and California Railroad Company, and interest is charged upon it?

A. Interest is charged, yes. Interest is charged on all amounts advanced the Oregon and California Rail-

road Company for additions, betterments and new construction work, just as is common between any companies.

Q. But the Southern Pacific Company gets the benefit of those additions, because it operates the line, does it not? Let me ask you a question: Is that done under the lease, or because of any agreement outside of the lease, so far as you know?

A. Really, I never considered that. It is so common that you get interest on money that you loan or advance to another concern.

Q. Or that you build a railroad to operate for yourself?

A. Yes.

Q. The Southern Pacific Company spends money to build a railroad to operate itself, and charges somebody else interest on it?

A. It is operating the Oregon and California Railroad under a lease.

Q. Yes, but it gets all of the proceeds from the operation, doesn't it?

A. No, I don't think it does. I don't remember just what the terms of the lease are now. The facts are, though, that the Southern Pacific Company charge and collect interest on cash advanced these other companies—the Oregon and California or whatever company it advances money to.

Mr. Fenton: Defendants will admit, that is, defendants for whom we speak, that under the lease the Southern Pacific Company operates the Oregon and California Railroad, collects its entire income from operation, and accounts for it and charges that company with any advances that it may have made over and above what it has received, and that that was the reason why this deficit appears; that there has been a deficit from the beginning of the lease down to the present time.

Q. You have nothing in your office, so far as you know, that would show who actually advanced the money that was used in the construction of this railroad from Ashland southerly to the State line, have you?

A. No.

Q. Nor from Delta in California northerly to the State line?

A. No. Our records—

Q. Nothing from which you could send any statement after you return to San Francisco upon that point?

A. As to who advanced the cash?

Q. Yes, who actually advanced the cash.

A. No, only from the records as they now exist showing that the cash was advanced.

Q. That the cash was expended, you mean; but as to whether it was advanced by one company to another, there is nothing in your records here to show, is there?

A. The cash was expended but not advanced—I don't quite understand.

Q. I say your record here shows simply so much cash expended in construction, but it does not show where the money came from?

A. No. No, it shows the cost of the property there as about forty million dollars.

Q. What rate of interest is charged by the Southern Pacific Company on these advances?

A. I could not say. I cannot answer that.

Q. Look on page 8, the last item under date of June 30, or the next to the last item under date of June 30th, it says: "Difference in rate of interest from 4 per cent to 6 per cent on open account with S. P. Co., year ending June 30, 1909." Now, what does that mean?

A. That would indicate that there was an adjustment in the accounts as between the two roads of interest charged.

Q. Well, that the rate was raised to six or reduced to four?

A. Raised to six.

Q. It indicated it formerly had been charged at four per cent, and the difference was now charged?

A. Two per cent more.

Q. To raise it to six per cent?

A. Yes. That is year ending June 30, 1909.

Q. It is possibly the result of an erroneous compu-

tation.

A. Pretty low rate of interest that year.

REDIRECT EXAMINATION.

Q. I now show you a statement which for the purpose of identification may be marked "Defendants' Exhibit 293," and ask you to explain where you obtained that statement and what you understand it represents.

A. This statement represents the cost of the road and equipment of the Oregon and California Railroad Company at the close of each of the years named in the statement—December 31, 1888, $30,927,000,—and June 30, 1912—

Q. You need not read the statement.

A. The first year in the statement is December 31, 1888, $30,927,000; June 30, 1912, $41,147,417.58.

Q. Now, from what sources did you obtain the figures for the years ending December 31, 1888, and down to and including December 31, 1895?

A. The figures for those years were taken from the annual reports of the Southern Pacific Company forwarded to its directors.

Q. Do you recall, Mr. Adams, whether those reports are made to the Interstate Commerce Commission in the name of the Oregon and California Railroad Company as well as in the name of the Southern Pacific Company, as to this particular mileage, or as to each so-called leased company?

A. There are two reports made. One is by the Southern Pacific Company—the operating company, and the other by the Oregon and California Railroad Company.

Q. They are both required to be made to the Interstate Commerce Commission?

A. Yes. They require a different form of report for an operating company and a leased company; but the reports are rendered in accordance with the requirements of the commission.

Q. And these, then, are official figures taken from those reports?

A. Oh, yes, yes.

Whereupon defendants offered in evidence Defendants' Exhibit 293, to which complainant objected on the ground made to Defendants' Exhibit 286. Whereupon said Defendants' Exhibit 293 was received in evidence and marked "Defendants' Exhibit 293" and is hereinafter set out and described and made a part of this statement of the evidence and identified as such.

Whereupon the witness further testified:

Q. Do you know why it was there was a change in the fiscal year from December 31st to June 30th, or do you have any knowledge on that subject?

A. Why, yes, it was made to conform with the reports that were made by railroad companies generally to the Interstate Commerce Commission. Their fiscal year ends June 30th.

Q. That is, the fiscal year of the Interstate Commerce Commission?

A. Yes, the fiscal year; and usually a railroad company's fiscal year ends June 30th to conform with the Commission's year.

RECROSS EXAMINATION.

Q. Now, by process of subtraction you can determine from this defendants' exhibit 293 the amount expended in any given fiscal year that is covered by the report for betterments and improvements and additions?

A. That is correct.

Q. And construction? That is all included of course?

A. Yes.

Q. That is, it would include new construction and betterments and additions as well?

A. It would include—no, new construction. Construction of a new line would not be included in there. I mean by that that that does not include the entire construction of lines in Oregon. It would include any new work on the Oregon and California Railroad.

Q. Or any new construction by that company or in the name of that company?

A. Yes.

Q. But not any new Southern Pacific Company lines in the name of some other corporation?

A. Yes, that is it.

Q. I understand.

REDIRECT EXAMINATION.

Q. Mr. Adams, I wish you would refer to defendants' exhibit 291, and make such explanation of that exhibit as you think will show what is the status of this $956,826.99.

A. On the right hand side of the statement we find cash receipts from May 13, 1887, to end of current month, $4,603,250.82. We find on the middle part of that statement advances by O. & C. railroad $956,826.99, making a total of $5,560,077.81, which was disposed of as follows: Expenses and taxes (left hand side of the statement) $3,062,364.80; cash paid over to trustee $2,497,713.01, making the total of the receipts $5,560,077.81.

Q. Then somebody must have advanced $956,826.99 for expenses and taxes more than the total receipts on account of this trust fund?

A. The expenditures for that amount in excess of the receipts, which amount was advanced by the Oregon and California Railroad Company as shown by the statement.

RECROSS EXAMINATION.

Q. Is that item included in the expenses and taxes account of $3,062,364.80?

A. The item of advances by O. & C.?

Q. Yes.

A. No, sir.

Q. Then this statement shows the expenses and taxes of this land grant, or these land grants, from May 13, 1887, to June 30, 1912, to be over $4,000,000.00?

A. No, sir. It shows them to be $3,062,364.80.

Q. Well, I ask you if that item of expense that is designated as advances by O. & C. R. R. Co. for expenses and taxes—$956,826.99, is a part of the $3,062,364.80, or whether it should be added to it to get the total expenses and taxes.

A. No, no, not at all. The item of expenses and taxes, the $3,062,364.80 is fixed—that is an expense. That is nothing else. That is expenses incurred. Now, to meet the expenses incurred and the amount paid to the trustee required over and above the receipts some one to advance some money, namely $956,826.99, which was advanced by the Oregon and California Railroad Company.

Q. I am going to get to that part in a moment, but you don't understand me. I say, that that is not an expense in addition to this $3,062,364.80, but is included in that amount.

A. No, it is not an expense in addition, nor is it included in the amount.

Q. Why is it designated for expenses and taxes?

A. Where is it designated?

Q. Why is it designated for expenses and taxes?

A. It is not designated for expenses and taxes. The expenses and taxes are as shown—$3,062,364.80, you see. That is expenses and taxes. Now then, paid to trustee $2,497,713.01, making the total of $5,560,-077.81. Now, the receipts were short of that amount $956,826.99. Some one put up that cash—the Oregon and California Railroad Company.

Q. That is exactly the point. But I am trying to get you to explain that that is not an added expense. If it had just read, "Cash advanced," it would have been just as intelligible as it is now.

A. Excuse me, but it is not an added expense. If I did not state that, it is not.

Q. That is what I am trying to develop—that should not be added to the other.

A. No, you are right.

Q. It is just cash advanced?

A. Yes.

Q. You say that is advanced by the Oregon and California Railroad Company?

A. Yes.

Q. Well, where do they get the money?

A. Why, the Oregon and California Railroad Company—where did they get that money? Presumably from the Southern Pacific Company. But whether they got this money, or what money they got, the South-

ern Pacific Company advanced them money and have advanced money to them all through the year and years.

Q. Do you keep a cash account for the Oregon and California Railroad Company?

A. In that way—credit their account with the credit, and charge their account with the cash received and with the cash disbursed on account of the land accounts, speaking of Oregon and California land accounts.

Q. You mean, as you testified this morning, that you keep an account of the cash that the Southern Pacific Company receives and that it disburses?

A. Yes.

Q. But you do not mean that the Oregon and California Railroad Company actually receives or disburses any cash?

A. No. No, I don't mean that at all.

Q. And this $956,826.99 was obviously advanced by the Southern Pacific Company, but in its account with the Oregon and California Railroad Company it was charged against the Oregon and California Railroad Company.

A. That is what it amounts to.

Q. That is all there is to it?

A. Yes; there cannot be anything else.

Q. You don't understand that to be an advance in one sum, but the total of perhaps several items?

A. They paid the bills as they came along.

Q. It is probably the total of a number of items rather than a single item?

A. That is right.

Q. And I presume those same items, or at least a part of them, would be found in this more detailed statement, defendants' exhibit 290, as having been advanced by the New York office, or the San Francisco office for that matter, and charged against the O. &. C.?

A. Yes, they will appear in there as the transactions occurred, but as to detail more particularly in the statement of expenses and receipts as shown by this. This is the analysis always.

Mr. Fenton: Referring to what exhibit now?

A. 287, I guess that is called. That form is the class of expenditures, you know. But your statement is correct that they will be found in that form.

Q. That is, for the years that are covered by exhibit 290?

A. Yes, sir.

Q. This may include additions prior to the year 1905? This item of $956,826.99 appearing in defendants' exhibit 291 may include items antedating this exhibit 290, for all you know?

A. Possibly, but I think not. I think there is nothing there prior to 1908. I think it is all since that time.

Q. You think the items could be ascertained more specifically, then, in this exhibit 290?

A. Oh, no; you could not find the item in there, no. You could not get that out. It simply means that the Southern Pacific Company has paid those bills, and that is the amount that they have advanced to them.

Q. They must appear in this?

A. They do appear in there, but you would not recognize them from that statement, nor no one else. I mean that you could not locate an expenditure with cash as you find it in there. Now, I wanted to make this clear, and I hope that I have. The statement seems to be left handed till you look at it closely.

Whereupon J. H. SHARP, called as a witness on behalf of the defendants being first duly sworn, testified that he is tax clerk in the Land Department and commenced employment with the Company in 1883, under William H. Mills, then land agent for the Central Pacific Railroad Company. He became a deputy under Mills in 1885, and continued such deputy for William H. Mills, land agent of the Central Pacific Railroad Company until the death of Mills in May, 1907. Mills was appointed land agent of the Oregon and California Railroad Company in 1888 and until his death occupied that position; his position as deputy did not apply to the Oregon and California; he had no formal appointment, but had charge just the same. "Defendants' Exhibit 255" being deed form 3332, form 4501 and form 4502, purporting to be forms of deeds of the Central

Pacific Railway Company are the same forms in general use by the Central Pacific Land Department at the time Mills was appointed land agent of the Oregon and California Railroad Company. These forms were drafted by William Singer, Jr. Mills was never at any time land agent of the Southern Pacific Company. The Southern Pacific Company did not, to his knowledge, have a land department in San Francisco. Prior to the time that Charles W. Eberlein succeeded George H. Andrews as acting land agent, the land department of the Oregon and California Railroad Company was maintained and operated at Portland. Andrews reported any matters of that kind to Mills under whose direction he was acting.

Whereupon on cross-examination witness further testified that Mills was land agent of the Central Pacific Railroad Company, which included not only the grant to the Central Pacific under the Act of July 1, 1862, but the grant to the California & Oregon Railroad Company under the Act of July 25, 1866. His title was land agent. Shortly after the Oregon and California Railroad Company became a part of the system of railroads operated by the Southern Pacific Company. Mills then became land agent of the Oregon and California Railway Company and George H. Andrews at Portland acted under the direction of Mills. He means to say that the Southern Pacific Company itself did not have anything to say as to the policies to be pursued in the disposition of the lands of its constituent companies, and that it did not influence under the administration of

Mills the policies pursued by the Central Pacific Railroad Company as to its original grant or as to the grant to the California & Oregon Railroad Company, or as to the grants in the State of Oregon involved in this case. He believes Huntington was president of the Southern Pacific Company during that time, but could not say whether or not Mills was responsible to Huntington for the discharge of his duties. He supposes Mills took his instructions from the Board of Directors of the Central Pacific Railroad Company, but he never knew Mills to have any practical instructions or suggestions from time to time while Mills was engaged in that work. He does not know that Mills was subject to instructions of Huntington as to land matters, but thinks Mills was given free range by the Board of Directors. He does not know anything about any other duties of Mills, but only knows that his duties related to land matters. The connection of Mills with the Company related to these land grants and land matters and not to operation or anything of that kind. He believes that Judge Cornish was at the head of the land department after the Southern Pacific Company became a part of the so-called Harriman lines —he so understood it. In that way he may have at that time had general supervision of the policies of all these land departments, but he does not know anything about that himself. He took his instructions from Mills, and he does not feel competent to say from whom Mills took his instructions, outside of the instructions that Mills got from the Board of Directors of the Central Pacific Railroad Company in his appointment.

Whereupon DAVID LORING, called as a witness on behalf of defendants and being first duly sworn, testified that he resides at Portland, Oregon, and is at present a civil engineer and surveyor and is not in the employ of the Southern Pacific Company or the Oregon and California Railroad Company, or any of the parties to this suit. He entered the employ of the Oregon and California Railroad Company March 1, 1882, as engineer on location and construction during a portion of that year. Later on he was for a short time in charge of the taxes of the land department and immediately after that was right of way agent, obtaining the right of way on the southern extension from Roseburg to the State line of Oregon, to the southern State line. After that was finished he went into the land department of the Company as chief clerk, that was sometime in 1884, and he remained there as such until October 1, 1904. During the last two years, or about that length of time, he was assistant treasurer to the Oregon and California Railroad Company, his immediate superior, while he was in the land department was George H. Andrews, who was first secretary and treasurer of the Company and supervised the operation of the land department and who later on became acting land agent and remained such until October 1st, 1904. Andrews was succeeded as acting land agent of the Oregon and California Railroad Company by Charles W. Eberlein, who took charge as he understands. He has no personal knowledge what his position was. The land department of the Oregon and California Railroad Company during the time he

was connected with the Company was maintained, located and operated at Portland, Oregon, and he served as chief clerk from early in 1884.

Whereupon over the objection of counsel for complainant that the same was immaterial and irrelevant and that the witness was incompetent to testify as to the policy of the corporation, witness further testified that when he went into the office the land agent I. R. Moores had just lately died and he was put in charge of the office, subject to the supervision of Mr. Andrews, whose office was on the lower floor while theirs was on the upper floor of the building. He found a form of contract in force requiring payments annually with interest and deeds to cover the same when paid up in full and collections were made on these contracts according to the form required. The tract books, meaning the plat books, showing the land, had prices marked on them by their predecessors, and where he thought the land was not priced high enough, he changed the prices to conform to what in his judgment they should be sold at, and in cases where those lands were sold the contracts were made out in conformity with those prices, subject to Mr. Andrews' revision. In some cases Andrews changed the prices and in some he did not. They had a book which had been made up before the time of witness from examinations made by field agents of the property with the appraised prices on them, varying from 25 cents to $10.00 or $12.00 an acre. These prices were not marked on the plats, but in selling any of the land included in these examinations they were guided by them in the price.

Some years afterwards they started examining lands on their own behalf and the appraised values as given by the examiners were entered with the description of the property in the same book up to a certain length of time. Then he made a set of books which each field agent should have covering a whole township of odd numbered sections and his descriptions were all written in those with his appraisement of value, and filed, and were used thereafter. When contracts which had been made were paid up, the proper deed was filled out to conform to the conditions in the contract, and a list of the same was made up monthly or periodically, and executed by the president and secretary and he as notary executed nearly all of these deeds with the exception of when he might have been away on a vacation or sick. The deeds provided a release of the mortgage given to the Union Trust Company of July 1, 1887, for that particular tract of land and after the deeds were executed at Portland they were sent to the trustees to be released there. A list of the lands with a full statement of the amounts received was sent with them and in due time they came back and were delivered to the owners, if they could find them. They could not always find them. That is to say that the deeds were so drawn that the Union Trust Company joined in releasing that particular tract.

Whereupon the witness further testified as follows:

Q. Now, what was done, if anything, about observing in any way the Act of April 10, 1869, attempting to modify or limit the price and quantity at which the lands

granted by the Act of July 25, 1866, should be sold, and the provision of the Act of May 4, 1870, upon the same subject, during the time that you had official connection with this land department?

A. I don't think that I was governed at all by the Act, only by instructions from my superior as to what I should do in the office.

Q. And in placing the prices and in estimating the quantities of land which should be sold or included in any contract of sale or deed, did the Company in the administration of this grant while you were in the office or connected with the land department, pay any attention to those statutes?

A. In respect of settlers on railroad land, odd sections, they made a point of selling to them at the appraised value of the land without considering the improvements that there might be on it.

Q. By what appraised value do you mean?

A. By our field agent's, or such information as we could otherwise gather.

Q. Now did that appraised value have any reference to the two dollars and a half an acre?

A. I don't know that it did; not in my instructions.

Q. Now those so-called settlers that might be on an odd section within the limits of the grant, were there many of them in the latter part of your administration or were these principally during the very early part?

A. They were nearly all south of Roseburg, who

had settled on the land prior to the construction and withdrawal of the land south of Roseburg, before my time.

Q. That is to say, when the Company came to the administration of the grant after the withdrawal of the lands and the construction of the road it was found that there were some people actually on odd sections within the limits of the grant that had gone there prior to the withdrawal and that as to these you recognized their applications to purchase and sold it to them at the appraisal prices fixed by your cruisers; is that the way I understand it?

A. That is the fact.

Q. And that is the way that that was handled?

A. That is the fact.

Q. Could you, roughly speaking, give any estimate as to the number of such so-called settlers or cases where persons had gone upon the lands and had made some improvements and were in possession when the Company undertook to administer the grant?

A. I could not give any estimate of amount or number of people. There was a book kept, called Railroad Pre-emptions.

Q. Railroad Pre-emptions?

A. A railroad pre-emption book; and that was the list I referred to. It was written out in the handwriting of our predecessors almost entirely, and when the withdrawals were made so that it made the grant ef-

fective to us we sent them proper notices, and I think that out of the whole amount on that list not over five per cent responded. We sent them regular notices, and then after a length of time we sent them a registered letter stating that if they did not buy within a certain time we should cancel that old filing and sell to anyone else. Some responded and we sold to them at the appraised value after we had examined it. When they answered we sent out some one to look at it, and then from his report we fixed the price.

Q. Were these so-called settlers that were in that situation persons who had entered upon the lands supposing or believing that they were public lands?

A. I could not say.

Q. And had undertaken to make settlements at one hundred and sixty acres or less?

A. I could not say. I know positively, though, that a great many of them were old donation settlers having donations and having other lands adjoining.

Q. Well, had they moved off of their donation claims on to these railroad lands, or simply enclosed them?

A. I can't remember about that.

Q. In making these appraisals and selling these lands to those people, did you, or did you not, estimate the value of any of their improvements and charge them for them, or did you just estimate the value of the land?

A. Estimated the value of the land.

Q. Do you recall whether there was ever any conflict or contest between any of these so-called settlers and the Company with reference to any of these lands?

A. I don't remember now.

Q. Don't you know, as a matter of fact, that there were never any contests with reference to these lands that were settled upon under these circumstances during the time you had charge?

A. Not to my knowledge or remembrance.

Q. There were none to your knowledge?

A. Not to my knowledge or remembrance.

Q. What became of that book which you called the Pre-emption Book, do you know?

A. It was, with all papers, turned over to Mr. Eberlein.

Q. And could you give the Court any idea of about the number of entries, I mean claims or pre-emption claimants approximately that that book would have in it?

A. I could give you approximately the number, but a great many of them were by different parties for the same land, or a portion of the same land overlapping, so that it would not be the actual number of say one hundred and sixty acres each.

Q. Can you give the Court any idea of the probable acreage of land that might have been affected or that was affected by these so-called pre-emption filings, as

you call them?

A. My remembrance is that there were in the neighborhood of four hundred odd filings; but that would not represent one hundred and sixty acres to each, as I say, because what proportion were duplicated or partially duplicated I can't tell.

Q. Now, as I understand you, Mr. Loring, the Company undertook to recognize these people when they were actual settlers on odd sections and to adjust the prices to let them have the lands if they desired them?

A. We did; and we sent notices to every one of them.

Q. Without regard to the $2.50 an acre clause, or without regard to their improvements?

A. Without regard to their improvements or any price except what our field agents placed on it. If we had an answer from a man that we sent to, then we examined the land. If we had no answer, we didn't examine the land.

Q. About what proportion of these pre-emption entries in this book were put there by the predecessor of Mr. Andrews, Mr. I. R. Moores?

A. Nearly all of them. There may have been a few in the first two or three years of Mr. Andrews' and my supervision.

Q. Now what was the policy, if you know, of the Company during this time that you were in the admin-

istration of this grant with reference to encouragement of the sales of these lands to persons who would settle or cultivate the same or establish homes upon them?

A. The preference right was always given to them as against anyone else.

Q. Do you recall, Mr. Loring, about when it was that these lands that were remote from the foothills and remote from the Willamette Valley and from the Rogue River Valley and the Umpqua Valley, and the other agricultural portions of Western Oregon, and that were situated in the Coast Mountains and in the Cascade Mountains, began to have an inquirng or general market value for timber purposes? Do you remember about when that was?

A. No, I don't think I do.

Q. Well, was there a time during your connection with the Company when there began an inquiry for these outlying lands that had hitherto had no market value and the inquiry was on account of their timber values?

A. My impression is it was after 1894, the high-water; scarcely much of anything before that.

Q. Well now, was this inquiry all at once or was it gradual?

A. It was gradual and increased as the Michigan and Wisconsin and Minnesota timber men came out here.

Q. Now that, as you remember, was not earlier than 1894?

A. I think not. There may have been a few scattering cases.

Q. These timber lands about which these inquiries were made and about which I have inquired were not in the valleys that I have mentioned, were they?

A. No.

Q. They were in the Cascade Mountains and in the Coast Mountains, were they not, chiefly?

A. Yes.

Whereupon witness further testified that William H. Mills became connected with the land department about 1888. Andrews consulted Mills, advised and reported to him as to the land sales, prices or anything of that kind. Mills made several trips to Portland after he became officially connected with the administration of the land department of the Oregon and California Railroad Company in 1888, supervising the land department, but witness thinks that Judge Singer came for Mills before Mills came. The land department continued to remain at Portland and to be administered there until the 1st of October, 1904.

Whereupon the witness further testified as follows:

"Q. During all of that time and during the time you were connected with it did you have any knowledge of any land department of the Southern Pacific Com-

pany?

A. I knew that there was a land department in San Francisco, but what it represented I didn't know.

Q. Well, was there any land department of the Southern Pacific Company here?

A. Not that I know of.

Q. And was there any land department maintained by the Southern Pacific Company at Portland?

A. Not in our offices."

Whereupon witness further testified that during the year 1888, respecting the grading of land or the cruising of timber lands after Mills came into connection with it, they put on larger forces of men in cruising the land, that is, one man went out in charge of the grading of land, cruising and getting a description of it; this man usually took from one to three men with him and in some cases had what they called a crew of three or four parties and had a general camp and cook and pack animals and the man in charge did cruising himself and had subordinates under him who did it and made out their own reports, but subject to his instructions. In 1891 and from time to time thereafter, approximately there were four parties in the employ of the Company of two or three men each, these men were instructed to examine certain districts or certain townships or portions of townships. He furnished them with the books to make their reports in and the books came back and were filed, and in a great many instances he or some assistant in the office made tabular lists of the amount of timber of

different varieties on these lands. The lands were nearly always examined for timber. The books referred to were about six inches by four and a half square, about three-quarters of an inch thick. On the left hand side of the page would be lines and the initails northeast, and part way down northwest, and then southeast and then southwest, for the quarter sections, and space enough on that page to write in those descriptions of the land. On the opposite page facing it was shown the quarter sections, subdivided into forty-acre tracts, so that the topography of the country could be put in there and that went all through the book by quarter sections, so that each book covered a whole township. The topography of these lands examined, was shown, on that quarter section diagram, on the opposite page from the writings, they were not put in by gradients. By topography he means showing the lands where the streams ran across the different lines of the forties or through them, and showed, where the man was able to do it, the hatching, as they called it, showing the hills or the valleys, as they might be; and in some instances they had barometers, in most cases they did, and they put down the barometer reading of the elevations of the different points. These books were printed and furnishd by the Company through him in the shape of small octavos of about seventy-two pages, practically. There were 18 sections to a township and four pages to each section and the books were three-quarters of an inch thick. When they were completed by the field men, they were filed away in the Company's office. He does not recall or state how

much of these grants involved in this suit, including the unpatented lands, was cruised in the field and reported upon in this way before he left the Company in October, 1904, but would say that it was considerably more than half. Richard Koehler was the excutive officer of the Oregon and California Railroad Company that resided at Portland at the tme and had general supervision over the land department and was in charge of the operation of the road. His position as related to the Oregon and California Railroad Company was that of second vice-president and manager, as he understood it. Koehler was also a director of the Company.

Whereupon the witness further testified as follows:

Q. What is the fact, Mr. Loring, if you know, as to whether some of these lands in these early days that were sold were sold at a price less than two and a half an acre?

A. I don't think any were in our time, but my remembrance is that there were some few cases showing on the contracts as sold less than that before our time.

Q. You say "our time"; you mean from the time you came into connection with the Company?

A. Prior to 1884.

Q. Yes.

Mr. Townsend: Now you mean subsequent to 1884.

Mr. Fenton: When he said prior to his time he meant prior to 1884.

Q. Were you yourself over a considerable portion of these lands during the time you were connected with the Company in any way?

A. Yes, quite a considerable.

Q. What would be your knowledge as to whether or not these parcels of land that were susceptible of actual settlement or the establishment of homes were large or small tracts contiguous to each other, or whether they were large or small tracts that were widely separated from each other and with other lands between that were either timber or incapable of actual settlement? What is your recollection and knowledge on that subject, based upon your personal knowledge from being over these lands, and based upon your knowledge of these field reports, these books that were returned to you, and the official knowledge that you obtained in that way from the records of the Company?

Mr. Townsend: The question is objected to in so far as it relates to the knowledge of the witness based upon field reports and any other source of information than personal observation, as incompetent, hearsay and irrelevant and immaterial. There is so much evidence concerning the character of this land and its susceptibility to settlement that I have not incumbered the record by interposing an objection every time the subject is touched in the examination of the witnesses, and I therefore ask counsel to stipulate at this point that all testimany heretofore taken or hereafter taken concerning the character of the land and its susceptibility to settlement

shall be received subject to the objection by the Government that it is immaterial and irrelevant, the character of the lands in no way excusing breaches of the condition as to quantity of lands to be sold to any one purchaser or as to the price at which the same should be sold, and the character of the land or its susceptibility to settlement, therefore, being in no way at issue, directly or indirectly, in this case.

Mr. Fenton: It may be understood, and the defendants so stipulate, that the Government may save its objection and exception to all testimony of this character heretofore taken or all that may be taken hereafter, tending to show the character or kind of land, or its capabilities, as stated by counsel.

A. I had occasion to go over the greater part of the lands south of Roseburg during my term as right of way agent. Also after that every year I took two weeks in the mountains hunting, and at a different locality every year, for upwards of fifteen years, and I that way became very conversant with the country and the nature of the land. I can't remember any large tracts which were remote from the immediate valley which would be easily settled and upon which a man could make a living. There were some small places which would make a very good residence and perhaps could make a garden, but he would have to clear the heavy timber to do anything further, and they were not very near together.

Q. Were these parcels that were capable of being occupied for a home site, for a garden and dwelling,

small tracts generally?

A. Almost always.

Q. And were they or not widely separated from each other?

A. Almost invariably.

Q. And were these not chiefly such lands as had been entered upon or claimed by these so-called pre-emption claimants during construction or prior to the completion at that time?

A. I am not referring to those; I am referring to entirely different lands.

Q. Now what is your knowledge as to whether or not the Oregon and California Railroad Company has at all times since 1884 when you came to have knowledge of the Company's affairs, up to October 1st, 1904, when you discontinued your relation, been in the possession of these lands, how did the Company evidence this claim to possession, in what different ways, if you know?

A. Approved selection lists were on file in the office, patents issued by the Government to the Railroad Company were in the office and such patents had been recorded in the various counties in which the land represented in them lay; they issued deeds for lands embraced in the patents and sometimes otherwise; and they paid the taxes on the lands, which was sufficient evidence to me that they owned the land.

Q. What did they do, if anything, about protect-

ing the lands from fires and trespassers and persons who might take possession of them by sending field agents or other persons over them?

A. They had inspections made where it was heard that men were trespassing on the land; agents were, at times, sent to them to see by what right they were there, and, if they had none, to make them either purchase or get off; and I think we had a suit in ejectment to eject one party from the land, if I remember right. We also protected some of the land by stretching a wire all around it, and during the last ten or twelve years of my service we had fire wardens during the hot weather all through the timbered tracts protecting them, making reports monthly and looking after the fires.

Q. What efforts, if any, did the Company make to prevent depredations or destruction or waste of the land by persons who were not entitled to take the timber or trespass upon the same?

A. I can't remember any individual instance, but they attempted to stop anything of the kind that they heard of or could see.

Q. What, if anything, did the company do towards leasing the grazing lands, any lands that were suitable for grazing purposes or purposes of that character, during the time that you were there?

A. There was some leasing of lands during the latter part of my term with the Company, but my remembrance of it is not very distinct, as I had nothing to do

with that. It was all done by instructions from Mr. Andrews personally.

Q. Was this claim of the Company to ownership one that was open and generally known to everybody, if you know?

Mr. Townsend: Objected to as incompetent, irrelevant and immaterial, and assuming a state of facts not shown to exist, and calling for a conclusion of the witness upon a question of fact and also a question of law as to the character of the so-called claim of ownership.

A. It was so understood through the country, commonly.

Q. What is the fact, if you know, as to whether prior to the completion of the railroad from Roseburg south to the California state line, the timber lands, that is such lands as were chiefly valuable for timber and were not available or susceptible of settlement or the establishment of homes, had any market or other value? That is, the road was completed over the territory I have mentioned in December, 1887. I refer to the time prior to that time as to whether these timber lands so-called had any market value.

Mr. Townsend: That is objected to as incompetent, irrelevant and immaterial, and assuming that some of the lands were not susceptible to settlement.

Witness: Will you state in what part of the grant?

Mr. Fenton: Read the question and that will indicate it. I say the timber lands, prior to 1887.

(Last question read.)

A. There was no demand on our office for any of the land as timber land. The only land I ever heard of prior to that date as having a market value was the Government even section lands south of the Siskiyou Mountains and east of the Cascades known as the Jenny Creek district, which was bought up by cash entry, a great deal of it, and some by timber claims for timber.

Q. Was that in the eastern part of Jackson County, Oregon?

A. The southeastern and partly in Klamath.

Q. And in the State of Oregon or in the State of California?

A. Oregon.

Q. Then you did hear that some of these lands were entered under the pre-emption law, I mean the even sections in the southeastern part of Jackson County and the western part of Klamath County, known as the Jenny Creek country?

A. Yes, sir.

Q. And do you know what became of those lands? Did you follow it up?

A. They were bought by speculators.

Q. Timber investors?

A. Yes, sir.

Q. Now were these lands prior to December, 1887, and commonly called timber lands, applied for by any

persons desiring to settle upon them the same so far as you know? I mean to the Company.

A. If they applied for the lands we didn't know that they wanted to settle on them. The application didn't have to so state.

Q. I understand, but from your knowledge of the administration of the grant aren't you able to say whether people applied for any of these timber lands for the purpose of going in there and making homes on them or settling?

A. Not to my knowledge.

Q. As a matter of fact, was there prior to 1887 any movement in these Company lands on the part of the Company or any applicants to purchase for any purpose of any considerable amount?

A. No, except there was a slight movement in the eastern part of Clackamas County.

Q. Clackamas County?

A. Yes, which was nearby here.

Q. That is south of Portland here?

A. And the timber being susceptible, being easily gotten to market; they would go in there and cut that off and could utilize it nearby.

Q. Well, these people that would apply for the purchase of these lands in Clackamas County, were they applying for it or buying it for the timber that was on it, or buying it for the land to make homes?

A. Some of them made homes on it after they cut the timber off, but whether they stayed there any length of time I could not say. They had their homes there at the time, a few of the purchasers. They were purchasers from us.

Q. But you don't know whether these purchasers in a short time sold the lands to mill men and afterwards moved away? You don't know?

A. I have no knowledge of that.

Q. Do you know of your own knowledge of any of these people that bought a quarter section from the Company in the eastern part of Clackamas County that removed all the timber from any of those quarter sections that were timbeerd lands when they bought them?

A. No.

Q. As a matter of fact, a few German settlers bought some of these lands in the eastern part of Clackamas County and made small clearings and lived on these lands and sold timber from these lands to the saw mill men while they were living there?

A. Yes.

Q. Isn't that about the way that that was done in small quantities?

A. To my personal knowledge it was done in some few cases. I was on the ground and saw the places.

Q. Was there any considerable number of those instances, or only a few?

A. Not many.

Q. What do you mean by not many, as many as twenty or thirty, or how many?

A. Well, of the lands which we sold in that locality I should not suppose there was more than five per cent of them that did that.

Q. Five per cent of the sales which the Company made?

A. Yes.

Q. Now what is the fact, Mr. Loring, as to whether or not during all the time you were connected with the Company in its land department the Company did not undertake to sell its lands that it did sell at the best price that it could obtain to anyone who wanted to buy without regard to two and a half an acre, or without regard to the area, other than these cases where these pre-emption people had, as you say, in the early days gone upon some of these lands where the Company preferred them? What is the fact as to how that was done?

A. We always got the best price we could.

Q. And did you, or not, sell more or less than one hundred and sixty acres, as the circumstances seemed favorable to the Company?

A. We sold as much as the man was willing to buy.

Q. Is it or not true that the land sales at prices exceeding two and a half an acre and in quantities exceeding one hundred and sixty acres to a single person were generally unknown and kept secret by the Company? Did the Company maintain, or attempt to maintain,

any secrecy as to its conduct of its business in this respect?

A. I never knew there was any particular secrecy maintained, otherwise than if an outside party who was not purchasing should inquire what land we had sold and how much to any particular person, we refused to give him information, as it was none of his business.

Q. Well, why did you do that?

A. Simply because it was a matter between us and the purchaser.

Q. If you had other lands for sale in the same vicinity and had sold to John Smith, for instance, one eighty in the same section and John Jones would come in and want to buy an eighty alongside of him and should ask you what John Smith paid for the eighty, would you refuse to tell him?

A. I don't remember, but I don't think I should tell him. I should tell him the price of the land we wanted, but it didn't matter—

Q (Interrupting) Now did you give any instructions to these people who took these contracts for the purchase and sale of the property that were payable in installments, that they should keep still and never show their contracts to anybody, or keep it away from the public?

A. No.

Q. Now, if you had been handling this same body of land and had not obtained the title under these acts

of Congress but had bought them yourself without regard to any of the terms of any statute, had a fee simple title, would you have maintained the same policy of telling an inquirer who asked about the price at which somebody else had bought a piece of land, that you could not tell him what it was, or you didn't want to, or you would not tell him? Would you have pursued the same policy with reference to that kind of land as you did with reference to this land grant?

A. I don't know but what I should have.

Q. State to the court whether or not, Mr. Loring, the company, or any of your officers over you and giving you directions, at any time withheld from the public or secreted from the public, as charged in the bill of complaint in this case, in substance, so as to conceal the fact that some of these lands were sold and most of them were sold in excess of two and a half an acre, and some of them in quantities in excess of one hundred and sixty acres?

A. No.

Q. Did the Company, or you, or anyone connected with the Company, withhold from the public records any of these contracts if the parties desired to have them recorded?

A. No.

Mr. Townsend: Were any of these contracts acknowledged?

A. No.

Mr. Townsend: Were any of them entitled to record under the laws of this state?

A. They were recorded, some were.

Witness: I said some were recorded.

Mr. Townsend: Were any of them entitled to record under the laws of this state?

Witness: I don't know."

Whereupon the witness on cross-examination further testified that he has lived in Portland continuously since he severed his connection with the Oregon and California Railroad Company on October 1, 1904, and he was living in Portland during the year 1907 and recalls meeting Mr. Townsend, counsel for the complainant, on August 23, 1907, or about that time and discussed the general subject of his knowledge concerning this land grant with him. The conversation took place in the old grand jury room of the Post Office Building and in the northwest corner thereof at Portland, Oregon. He could not say that Mr. Fulkerson as stenographer took down in short hand the information which witness gave Townsend. His impression is that the stenographer was a woman but he would not say that Mr. Fulkerson was not the person, he does not know. He remembers that the statement was taken down in short hand and that he gave the information from time to time as Mr. Townsend dictated the substance of it to the stenographer in his presence, and that afterwards when the statement was completed, a copy was given to

him for inspection in Mr. Townsend's office and he read it over and corrected it.

Whereupon witness examined "Government's Exhibit 116" and further interrogated in reference thereto testified that Mr. Townsend, after discussing one subject with him would then dictate the substance of it consisting of a few lines or in some instances a paragraph and in that way they went through the subject and Mr. Townsend and he did not talk the entire subject first and then dictate the entire statement afterwards. He corrected Townsend, if the latter made an erroneous statement as he dictated. He did not intend to make any statement to Townsend but intended to assent to what Townsend might make if it was correct. Witness gave Townsend the information first and then Townsend attempted to dictate to the stenographer the information which he gave to Townsend and as Townsend dictated witness corrected it from time to time if Townsend made any error. Referring to this statement "Government's Exhibit 116" witness says that it is not the statement which he made for the reason that he swore to and signed two statements under promise that he would have one of them which was never given to him—this statement is not signed.

Whereupon the witness further testified as follows:

"Q. Now, you have examined this document Government's Exhibit 116; you have read it, have you, Mr. Loring?

A. Yes, sir.

Q. You have just called my attention to one portion of it which you say you do not recollect of having stated. Please underscore that part, and then I will read it into the record. I erased your crosses, but you know where it is.

(The witness here underscored portions of said document, as requested.)

Q. Now you have indicated that on page 5 of this statement the words "and it was the policy of the Company to avoid selecting as long as possible in order to keep them off the tax rolls," and also the words occurring four lines beyond, "and second, to avoid taxes," were not included in the oral statement which you made to me and that you do not recall that it was included in the statement that I dictated?

A. It should not have been, because it was not a fact and I would not have made any such statement unless it were a fact.

Q. So that your recollection is that you did not make those statements and that those expressions and words were not in the statement that you made to me and which I dictated?

A. They were not intended to be.

Q. I say that is your recollection, that they were not?

A. Yes, because I would not have assented to anything of the kind if I had known that it was there.

Q. With that exception do you say that the bal-

ance of the statement is correct, in substance, as the statement that you made to me at that time?

A. As near as I can remember.

Q. You would not now deny any of the balance of the statement?

A. I don't think I should, no.

Mr. Townsend: I now offer—

Witness (interrupting): One minute, Mr. Townsend, further on there, there are some statements relating to mineral examinations and sales which are rather obscure in the wording. I can understand what is meant there, but perhaps someone else might not.

Q. Well, I will give you an opportunity to explain what you meant by that, and that will clear it up. That is not probably material at this time, because not covered by your present examination, but so that you may not be misunderstood you are entitled to explain it, and I will give you an opportunity to, and I don't know any better time than right now. Please indicate the part that you refer to, designating it by page, and make any explanation that you think proper.

A. Mr. Townsend, this is what I referred to. The clause here reads, "It is also a fact that afterwards minerals were discovered, and such lands were sold as mineral lands after being patented." That is not what I would have intended to say. I should have intended to say, "It is also a fact that where mineral lands were discovered such lands were sold as mineral lands after be-

ing patented."

Mr. Townsend: I will state that I had that same understanding.

Witness: That I have just stated?

Mr. Townsend: Yes; and the awkward phraseology of it in this statement was mere carelessness in dictating.

Witness: That is the way it looked to me.

Mr. Townsend: I did not understand that you meant to say that they found where there were mineral lands and then got them patented.

Witness: That is the way it reads there.

Mr. Townsend: Well, it is susceptible, possibly, to that construction.

Witness: Yes.

Mr. Townsend: But that is not the way it was intended.

Witness: No.

Whereupon complainant offered and there was received in evidence "Government's Exhibit 116" to which defendants objected as incompetent, immaterial and irrelevant and not competent particularly by way of impeachment, which exhibit is hereinafter set out and described and made a part of this Statement of Evidence and identified as such.

Whereupon witness further testified that when he

became chief clerk of the Land Department in 1884 he found the records of the office were kept at least in part upon plats and part upon tract books and that some of the patented lands had been appraised and prices had been fixed upon the lands and these prices noted only on the plats. They also included lands not patented but no indemnity lands that had not been patented and they related more to the northerly part of the grant than to the southerly part. He has no personal knowledge of the method pursued by his predecessors in that work arriving at these prices except from the books of reports of field examiners. There were some small packages in the office when he went there but most of these had been rewritten into the book to which he has referred, but there was a great deal more examination and appraisal of the lands and fixing prices after he came into the office than before. When he and Andrews were of the opinion that the price which he found in the office, as to any particular piece of land, was insufficient he raised it to its real market value, according to his judgment. He fixed these prices subject to the approval of Andrews for the first year or two, and after that either Andrews did it or he and Andrews did it jointly, after Andrews moved up into their office. That practice continued as to fixing the price of these railroad lands more or less until he severed his connection on October 1, 1904. Andrews practically did it all the last ten years of their connection. No one supervised Mr. Andrews' work and Mills did not give his personal attention to the fixing of the prices of these lands unless Andrews asked his advice and that

was not as to all of the lands but as to some particular parcel of land, nor did Andrews ever consult anyone else besides Mills to the knowledge of witness. Witness did not to his knowledge consult anyone except Andrews or Mills, at least he has no personal recollection of doing so and never to his knowledge, after July 1, 1887, did the Union Trust Company take any part whatever in fixing the price at which these lands should be sold. The matter was determined, so far as he knew, by the employes of the Railroad Company and the Trust Company's connection with the sales of the land was limited to receiving the money and joining in the deeds.

Whereupon the witness further testified as follows:

"Q. Now, I did not quite understand what you meant by this class of pre-emptioners who were listed in this book which you found, and I think you said perhaps some additions were made to it after you came into the office. Let me ask you rather an involved question, but please follow it closely so that I can see what you mean. Do you mean that this book contained a list of those people who settled upon the land before the filing of the map of definite location and before the withdrawal of the lands of the Department of the Interior?

A. I don't know that they settled on it. They made their filings with us prior to that time. I have stated that I don't know if any of them were actual settlers on the land, in direct-examination.

Q. I understand, but they purported to be and filed some sort of a claim to that effect with you; is that it?

A. Yes.

Q. Now did you have regular blanks for them to make those claims upon, to make those filings?

A. I don't remember.

Q. You don't know whether it was a uniform form of blank, or whether they came in in different forms?

A. I can't remember that. They were all entered in this book in somebody's handwriting but ours; whether they were in regular formal application blanks or otherwise I don't now remember.

Q. Well, the substance of them was that they represented that they had settled upon the lands before the lands had been withdrawn, and that they desired to purchase them from the Railroad Company? Was that the substance of it? Or did they claim some right to purchase?

A. I don't know that they claimed any right. I think that they claimed that they were settlers on the land.

Q. And desired to purchase?

A. And desired to purchase.

Q. When you say that they were given preference to purchase, Mr. Loring, isn't this the fact: That at that time there was not a very large demand for those lands, and they were the most likely purchasers and therefore you were naturally brought into negotiation with them first as to the sale of those lands?

A. I don't know about that. All that southern country from Roseburg south, before the maps of definite location and withdrawal nearly all of that land could have been bought and was bought around there for a dollar and a quarter an acre. It was then offered land and it could be bought cheaply, and they did buy it all through there for that.

Q. You mean from the Government?

A. From the Government. You could go into the Land Office at Roseburg and buy day after day; one person could buy as much as he wanted to.

Q. Well then, you do not remember, do you, of there being any contests or any competition between these so-called settlers who wanted to purchase and persons who did not claim to be settlers?

A. Not at that time.

Q. As a matter of fact, if a person who had not claimed to be a settler had offered you more for the land you would have sold to him, wouldn't you?

A. Not if it had this filing on it. When we commenced selling south of Roseburg, which we didn't do until after the maps of definite location and withdrawal, and I think still later than that, when anyone made an application for land we always referred to this old pre-emption book to see if it conflicted with any of those applications before we sold to the one that was a new applicant.

Q. If the so-called pre-emption claimant, which is

sufficiently accurate for the purpose of our examination here, if he would give the same price as anyone else you gave him preference, did you not?

A. Yes.

Q. Now if he would not give as much as another applicant to purchase, would you still give him the preference?

A. There never was such an instance.

Q. Well, that is what I meant before, that there never was a time when you really had an opportunity to demonstrate whether you would give the settler the preference if somebody else would have offered a greater price. There never was such a time, was there?

A. I don't know of any such instance.

Q. So that you do not mean that you gave these settlers a preference in that sense that you would sell to them for less than you would to anyone else?

A. Not unless they had refused to purchase at the price we offered.

Q. Not unless who had refused?

A. You see, we notified all those parties to purchase when we were ready to sell; all of them; and then afterwards, whether we got replies, or if we did not get replies we sent registered notices to see if we could get answers, and where we got answers we then had the land examined and gave them a price at which we would sell to them. In almost all cases where we had answers

they purchased, and some they didn't. But I don't remember of any case where anyone who was not one of these pre-emptors offered to buy any land that a pre-emptor had applied for and had answered those letters which we sent out.

Q. So that this competition between the settlers and the non-settlers never took place during that time?

A. Not as regards those pre-emptors south of Roseburg.

Q. Now Mr. Loring, speaking generally the Company never to your knowledge made any effort to confine themselves, or, rather, to keep within the restrictions of these two grants as to the sale of the lands? I think you testified on your direct-examination to that effect.

A. In what respect?

Q. As to the sale to actual settlers only in quantities not exceeding one hundred and sixty acres to one purchaser and for a price not exceeding two dollars and a half an acre.

A. Only in relation to these pre-emption claimants I have just lately referred to.

Q. Well, did you understand that that was in obedience to these provisions of the grant?

A. No.

Q. So that that was a mere business policy of the company rather than responsive to these provisions of the grant?

A. That is all; thinking that they were there they had the best right if they had made the improvements which they claimed in their applications, we always gave them the preference right; or any settler at any time when he came up and claimed that he had a claim out in the mountains anywhere and he wanted to buy, we sold to him, rather, as against a large timber purchaser.

Q. Was there ever a time when you refused to sell to anybody that came to purchase and would pay the price that you asked?

A. I don't know any case.

Q. You don't know of a single instance during your twenty years' experience when they ever refused to sell to anybody when they came there and applied to purchase and would pay the price that the Company asked for the land?

A. I haven't any remembrance now, if there was any such.

Q. So that, if a man came into the office and applied to purchase a tract of land and offered to pay your price, he did not have to state whether he was a settler or not in order to negotiate a purchase of the land?

A. No.

Q. Do you not remember the fact to be that after Mr. Mills became land agent, and commencing with the years, speaking generally now, from 1890 to 1894, without confining it to any one of those years but at that

general time, that the Company, acting through its land graders and timber curisers, and particularly Mr. Britt and Mr. Elliott, went out and blocked out timber lands and rather encouraged the sale of the lands to the purchasers of timber lands?

A. I don't know that that was done, no.

Q. It is a fact, is it not, that during all that time the Company was endeavoring to sell all of the lands it could and for the best price it could; that is true, isn't it?

A. Yes.

Q. And when this demand for timber lands began the Company encouraged it and promoted the sale to the timber land buyers, did it not?

A. That is the fact.

Q. And with that end in view they employed experienced timber cruisers, like Mr. Britt and Mr. Elliott, and had them go out and block out timber properties that could be operated as one body and then negotiated sales of those large bodies of timber lands?

A. I don't know that they blocked it out especially. When any of those principal examiners went out they would examine a township, or a certain number of townships, but if some of the land was over a different watershed or different drain to that they were not so particular in examining that as they were the main body, but they would complete the township over that divide if they could do so in that season or in that trip.

Q. Well, that is what I meant. You have ex-

pressed it more clearly than I did in my question; that they would examine the land with reference to the watershed so that they could report the bodies of timber that could be operated together.

A. That was part of their business; what they went for, in any event, anyhow.

Q. Now do you not remember that one of the first large timber sales that was made was in the Mohawk Valley to the Boothe-Kelly Company, where Mr. Britt went out and examined a body of land there in a given watershed and reported it and through his efforts in connection with yours, perhaps, and the other employes of your office, that sale was negotiated to the Boothe-Kelly Company?

A. Well, he didn't examine that for any one particular watershed. He was directed, if I remember right, to examine all the lands in that locality that he could that season. I don't think he did it in one season; I think he took parts of two seasons to examine that tract in there, and later on it took other parties' time to examine the balance that was further back.

Q. Now, after that body of timber was examined and the practicability of operating it as a lumbering concern was determined, do you not remember that negotiations were entered into which resulted in the sale of a large body of land in that vicinity to the Boothe-Kelly Lumber Company?

A. The Boothe-Kelly Lumber Company,—John Kelly applied at the office and went into the matter with

Mr. Andrews and eventually bought a large tract of the land and at another time later on bought some more.

Q. But you do not remember personally whether Mr. Britt at the time he cruised it and examined it had in mind a prospective sale to the Boothe-Kelly people?

A. No, I haven't the slightest idea.

Q. You don't remember? You don't know?

A. Oh, no, I don't know what he had in mind at all.

Q. Now Mr. Loring, your recollection is that the substantial demand for timber lands began in 1894, or about that time?

A. Somewhere after 1894; about that.

Q. There were a few scattering sales, you said, before, but the substantial part of the sales of timber lands in large quantities took place after that?

A. Yes, except this large sale in eastern Multnomah, which was made before our time.

Q. To whom?

A. Neppach, I think.

Q. Oh, yes; and then there was that sale to the Gardiner Mill Company, too, that was made before your time?

A. Yes.

Q. So that down to that time, speaking generally, the conditions of the market was such that there was not much demand for these lands, except by settlers and

in small quantities and for a small price? That is true in a general way, is it not?

A. Yes, generally.

Q. And the greater part of the large sales, that is sales of large quantities to single purchasers and for a price considerably in excess of two dollars and a half an acre, took place after this demand for timber land arose which you describe as having occurred about 1894, or a little afterward?

A. That is correct.

Q. Did you ever hear while you were in the office any discussion of these provisions of the grants relating to the sale of the lands other than the discussion with reference to the Eaton case over here in Clarke county, Washington?

A. No; it would not be discussed except between Mr. Andrews and myself and Mr. Ewald, the old assistant treasurer, and the question did not arise except in that Eaton case.

Q. Down to that time it had never been discussed even between yourselves?

A. Not between Mr. Andrews and myself?

Q. Well, between yourself and anybody else?

A. No.

Q. That is what I meant.

A. Not with me; I hadn't.

Q. Then there was no discussion of it to your knowledge?

A. No.

Q. Now is it not true that there had been no public discussion of the question that came to your knowledge?

A. I haven't any knowledge of that.

Q. What I mean is, you knew of none?

A. I hadn't heard any.

Q. Now you do not know why this subject was not discussed, do you?

A. Not the slightest idea.

Q. Have you any other explanation other than that it had not been brought to the attention of the public?

A. I haven't any knowledge why it wasn't brought to the attention of the public.

Q. But it was not brought to the attention of the public, so far as you know?

A. Not to my knowledge.

Q. Did you find in the office any correspondence with reference to these provisions of the grant and the question whether they were enforcible or not?

A. Not that I know of. If there was I didn't search back through anything. I had enough troubles of my own without looking for back records.

Q. Well, of course in your work you would sometimes have occasion to refer to the back records, but at no time did you run across any correspondence of that

kind, as you now recollect? Is that true?

A. So far as I know. We had a good many papers in the files and correspondence with the Registers and Receivers of the various land offices, and that matter so far as I saw in those files and looking for information relating to different cases, never was touched on.

Q. Did you personally know of these restrictions of the grant at the time that you entered the office?

A. No.

Q. It was some time afterwards that you learned of it yourself?

A. A long time afterwards.

Q. Did you learn of it before the Eaton case?

A. No, it wasn't called to my attention.

Q. Nothing arose then, either publicly here in Oregon or in connection with the discharge of your own duties down there in the office, which called your attention to these provisions of the grants?

A. No.

Whereupon defendants moved to strike out "Government's Exhibit 116" and the whole thereof as incompetent, irrelevant and immaterial and as hearsay and as shown to be a narrative of a past transaction and a good deal of such narrative as hearsay.

Whereupon CHARLES W. EBERLEIN, called as a witness on behalf of defendants, being first duly sworn testified that he resides at San Francisco. Was

appointed acting land agent of the Oregon and California Railroad Company in the fall of 1904, resigned as such June 1, 1908. Before that time he reorganized all the land grants of the Harriman System of roads, Union Pacific, the several grants in Texas, Central Pacific, Southern Pacific—Southern Pacific Railroad Company and Oregon and California Railroad Company. When he refers to the Harriman System of railroads, he alludes to the Union Pacific, Southern Pacific Company and the Southern Pacific Railroad Company, all of these constituent companies. He made a quick trip to the Pacific Coast in 1902, as near as he can place it now, took a glance at things generally in the Portland and San Francisco offices and returned to New York. Later, about the first of January, 1908, he came to Portland and entered into a thorough examination of all the affairs of the Oregon and California Railroad Company land grants and went to California about June 1st and there took charge of land affairs. Subsequent to January 1, 1903, the Oregon and California Railroad Company land grants and Southern Pacific Company land grant and the Central Pacific Railway grant came under his supervision and examination. One of his chief reasons for coming to the coast was to examine into the affairs of these different land grants from a business point of view to see if they could be handled more economically and with greater facility and ease. There were three complete organizations at that time and all of them running on different plans—plans that had been the growth of a great many years. Their books

and their blanks, their method of doing business and methods of accounting were all different. Each land department was handling cash and doing an accounting business, and for general purposes it was thought to be wasteful and cumbersome, difficult to understand by people at a distance. It was for the purpose of consolidation and simplification that the work was done, as much as for anything else. On an examination of records at San Francisco he found complications arising from a divided control. William H. Mills who was land agent of the Central Pacific Railway Company, held the title of land agent of the Oregon and California Railroad Company, and had a set of tract books in the office at San Francisco. George H. Andrews held the title of acting land agent of the Oregon and California Railroad Company and was loaded with the care and all the work practically of the Oregon and California Railroad Company grants. The divided control, the continued interference by Mills in things he did not know anything about, led to a condition, necessarily, of confusion in the records, and it was necessary in order to get any understanding, and particularly to reform the records, to suspend temporarily the business of the department, and that was done on his order, referring to suspension of business, he means the sale of land, which temporary suspension he ordered in the spring of 1903. There was no regular order of withdrawal, he simply told them to hold up sales while they wrote up new tract books. In furtherance of his general plan to reorganize the land department of the Oregon and California

Railroad Company and to ascertain the status of these grants, the financial situation of the sales and the condition of the taxes, he found out by a pretty extended examination made by himself individually, that a great many errors and omissions had taken place in the tract books of the Company and from any data in possession of the road that he could find, it could not be supplied. Deeds had been issued, warranty deeds in some cases, the consideration taken and accepted and the lands afterwards lost. Very often there had been sales, in a number of instances enough to put him on inquiry, lands had been sold before patents had been issued and afterwards patents had been denied. The whole condition was such that any business man reducing his affairs to order, would have called a halt. He devised a tract book that would serve for all land grants, meaning the three land grants, speaking of the Oregon and California grants as one, Southern Pacific Railroad Company grant as another and Central Pacific Railway grant as another. The same form of tract book was devised to meet all these cases, so that one set of men could keep these different books, that there should be system and order in all these land grants. The condition of the Oregon grants—he does not wish to reflect on Mr. Andrews, who is dead—the control of the grant was not in his sole control, he was subject to very vexatious limitations—the condition that had grown up called for a change of system, which should have been made before it was, to take carè of complications in title. For instance, the preparation of that general printed map of

June 1, 1907, was started long before that date, that is the date when it was printed, but in the preparation of that map, his recollection is now, that many thousands of donation land claims, about 10,000, are found within the limits of that grant. There were a large number unsettled and complications arising from resurveys. These donation land claims had been taken up during the fifties and their exterior boundaries did not coincide at all times, leaving a small triangular strip of ground in a great many cases—islands in the Willamette River and elsewhere—a large amount of land which, in the condition of these grants down to very recent times, was not considered worth anything; but it was his business to see that every particle of property that belonged to the road should be gathered up and a record made of it. That was the general condition that existed and had he not come upon the ground at that time, some one would have had to take up that work and prosecute it, simply by reason of the changed land conditions, which were then becoming acute, as they have since become acute. It became necessary to practically examine in detail every single section of land that originally fell to the two roads, to follow the title first through the land offices, and they were abstracted and all the data collated and transferred to new tract books. They made examinations, took the plats—United States Surveyor General's plats,—and in a number of cases those plats have been succeeded by others. There have been innumerable changes in these land grants. These donation land claims were necessarily irregular and there were many

thousands of them. There were no quadrangular surveys at the time those lands were taken in Oregon. The donation land claims were not taken according to legal subdivisions. There were no legal sub-divisions at the time they were taken. The lands were settled upon as the records apparently indicate and enclosures made, or temporary surveys made, by settlers under the Donation Act, and afterwards surveys were run out by the Surveyor General to conform to the notification made by the donation claimant. In doing so, donation land claims were taken so as to include the best available land at the time, and they would run the lines up the little valleys of small streams. At the time he took charge of the lands of the Oregon and California Railroad Company they were not all surveyed, a large body is unsurveyed. Speaking in a general way without reference to particular detail and referring to "Defendants' Exhibit 259," that is a fair representation of the record title as reflected by the records of the Surveyor General's office and of the United States Land Offices and in checking up the lands that are covered by the act of July 25, 1866, and the act of May 4, 1870, he found that it required, and became necessary in his judgment, to go through all of these public records. He thinks the records of the county were examined at that time for taxes and that they relied upon the deed records of the Company. They did not examine for deeds until at a subsequent time. The work of reorganization and checking up, was begun in the late spring of 1903 and was practically completed in the fall of 1904. The work

was pushed to the utmost. Worked as many people as they could. The work was jammed through pretty hard. It was desirable, in his opinion, that there should be a careful examination of the lands lying along the railroad lines by operating officials and traffic officials, to determine what lands the railroad company should reserve for its own operating and traffic purposes. As to that, he means that it was simply good business that at this time the operating officials should say what lands they were going to need for extension of yards, for water supply for engine, for fuel supply. At that time engines were burning wood on some of these divisions south. As to traffic, his experience on the Union Pacific and in the east had shown him that with the filling up of the country, the extension of traffic would call for grounds at central shipping points for stockyards and things of that kind. He turned over to the operating and traffic officials a list of lands which he had prepared co-ordinately with this other work, lands classified by section, township and range and also by counties, and they entered opposite the specific tracts what the land was to be reserved for and such reservations were entered on the tract book. In the fall of 1904 the work had practically been finished, excepting some general cleaning up, and he removed all the records, files and property of the land department to San Francisco and consolidated it there with the Southern Pacific Railroad Company. He does not mean consolidation in a legal sense of the term, but simpy it was kept in the same office, under his supervision as land officer, and the books and records of the

two grants, that is the Southern Pacific Railroad grant and these two grants of the Oregon and California Railroad Company, were kept by the same set of men and the records were kept separately. There could be no consolidation of records. He removed the physical custody of these records of the Oregon and California Railroad Company appertaining to the land department to the same set of offices in which he was also placing the records of the Southern Pacific Railroad Company, having charge of the grants in California, and he allowed the same staff of clerks to work upon the respective books of these land departments. Everything was kept entirely separate. The blanks and correspondence of the Oregon and California Railroad Company were even printed on green paper to distinguish at all times and keep from confusion. The Southern Pacific was on yellow paper. The reservation of 100,000 acres of timber lands for the future use of the Companies, in the operation of the Oregon and California railroad was made around near the railroad, convenient to transportation, such as for the manufacture of ties and bridge timbers and things of that kind, for the purpose of protecting the railroad against any possible contingency that might arise and to prevent the railroad, and incidentally the public, from extortion on the part of large timber interests; and that was afterwards found to be most necessary. These 100,000 acres were down around the Umpqua River, he cannot give the exact boundaries, though the lands were reserved and the plats thereof were all filed in the New York office when he left there.

Whereupon the witness further testified as follows:

Q. Now, what, if anything, did you do after you had thus re-established the records according to your plans, re-established the tract books according to your plans, and removed the offices of the land department of the Oregon and California Railroad Company to San Francisco, towards the restoration of the lands to sale in the usual and ordinary way, and why was that not consummated prior to April 18, 1906, when the fire in San Francisco occurred? State fully and generally, in your own way.

A. I notified my superiors in 1904, I think before I took the property, the books and records away from Portland, that we were ready; that the affairs of these two grants had been thoroughly reorganized and placed in a condition, a statement of the condition of the grants, the acres patented and unsold, and unpatented and unsurveyed, the whole thing was sent on, with the information that we were—I was ready at least, to proceed with the sales, or turn the grants over to a successor, which was the agreement with me when I consented to take the acting land agency, that I was to be relieved just as soon as this thing could be brought about. Now, as to the rest of your inquiry, in the fall of that year, I think it was the winter of that year 1904-5, before the first of January, though, because I fix the first of January by a forestry congress held in Washington, to which I was the delegate from the Southern Pacific Railroad Company. I was there at that time, so it was before

that time that I fix it. I was called to Portland—I don't know now just how or why, or whether it was on a request from Mr. Cotton—but at any rate Mr. Cotton surprised me by telling me that he had understood that I had given out that the road was going to resume sales, and was ready to, and I told him that I had, and as far as I knew, there was no reason why they should not go on at that time. "Well," he said, "you can't do it. The taxes have not been paid for years on some of it, and there are tax complications there. The records are in such shape that you could not go on and sell land, because you don't know but what a large part of this grant has been lost."

Q. Who was and is Mr. Cotton?

A. W. W. Cotton is, I think, he was in those days the attorney of the Oregon Railroad and Navigation Company.

Q. Was he or not also the adviser of the general officers that were in charge of the operation of these railroads in Oregon?

A. Why, as I understood it, you were the counsel and adviser for the Southern Pacific lines in Oregon; but as an explanation, as near as I can place it, how Mr. Cotton came to interest himself in this matter, was that there had been about that time, I think before that time a change in the tax management of these properties, both the O. R. & N. and the Southern Pacific lines in Oregon, and Mr. Morrow, J. W. Morrow, I think his name is—

Q. Yes.

A. Was appointed the tax agent or commissioner of all of these properties, the Harriman properties in Oregon.

Q. Isn't it a fact, Mr. Eberlein, that J. W. Morrow, who had been the tax agent of the O.-W. R. & N. Company, or the O. R. and N. Company it was then, was placed in charge of the tax matters of the Oregon and California Railroad Company and the Southern Pacific lines in Oregon, as a joint officer?

A. Yes, sir.

Q. And that Mr. Cotton was the legal adviser of the O. R. & N. Company, and in that way came into official relation with the tax department, or with the officer handling the tax department of the Oregon and California Railroad Company and its properties in Oregon?

A. Mr. Morrow, as I recollect, I understood had for years, or for some time at least, been the tax officer of the Oregon Railroad and Navigation Company, reporting directly to Mr. Cotton, and that when a change was made in the tax matters of the Southern Pacific lines his jurisdiction was extended to cover, and he still reported to Mr. Cotton.

Q. Now, then, at that point, after you had received this advice from Mr. Cotton with reference to the state of the tax affairs, tax matters, or tax titles affecting these land grants in Oregon, what, if anything, did you do towards investigating this matter, and what attorneys

did you employ, and for how long did this work continue?

A. The tax situation had not been considered by me as important, as I understood that the taxes had been paid on all patented lands. I had, in entering the data, looked into that matter somewhat, but not at all carefully, because I assumed that that had been done. Mr. Cotton informed me that that condition was very bad; that undoubtedly a lot of lands had been lost. How Mr. Cotton knew I never have been informed. At his request I had employed his uncle, who is since dead, to assist in this reorganization here, and he was representing me while I was necessarily absent below, as I was a great deal of the time.

Q. You refer to Mr. William Wick?

A. W. W. Wick. Now, Mr. Cotton made it appear to me that the situation was very bad.

Q. What was the title of Mr. Wick's employment? What was he called?

A. Oh, he was a clerk; that was all. He had no title at all.

Q. But when you were absent, he was your representative?

A. He was here, not in charge, but simply in the reorganization of the records doing the record work and following up these matters of title in the different offices, and collating the stuff and putting it in shape that it might be entered in the tract books. And Mr. Cotton

then advised me that it would be necessary, by reason of the peculiarity, as I recollect his advice, the peculiarity in the laws of Oregon, that there should be an examination of the tax records of all the assessors' offices in every county in which the grant lay in Oregon, for a period of fifteen years, as to each tract of land, and he advised the appointment of W. C. Bristol to take charge of that, and to organize a force to go on and make this examination, and that was done.

Q. Now, this reference to the tax laws of Oregon, at that time do you recall whether it referred to the fact, that under the laws of Oregon, then and now, lands were required to be assessed in legal subdivisions, or by proper descriptions, and that they might be assessed to the owner, if known, or if not known, to an unknown owner?

A. Yes, sir. We found that there was a large amount of land assessed to unknown owner. Some of it had gotten away.

Q. How long were your attorneys and tax agents and special employes in that work, engaged in this work of going through the assessment rolls and the tax matters for the purpose of removing any delinquent tax sales, or clearing up the title that might be involved by reason of anything of that kind over the period of fifteen years?

A. I can only speak for the work that was done under my own jurisdiction, for which I was responsible.

Q. Well, that is what I mean.

A. That investigation was a very long-winded affair—necessarily so by reason of the condition of tax records in some of these outlying counties, which was exceedingly bad, and it took over a year. My report, as I refresh my recollection from some correspondence I saved from the fire, shows that I turned over the results of that investigation to Mr. O'Brien on, I believe, the 30th of March, 1906. I think it appears in there, just prior to the fire, with a request that he should take it up and place it in the hands of attorneys to be cleaned up.

Q. Now, did you also cause to be employed Angell and Fisher, attorneys and searchers of records, and competent men of this city, in connection with this work?

A. Yes, sir. Angell and Fisher were employed by me, and they reported first to Mr. Bristol; and afterwards Mr. Bristol dropped out, and they reported to me as long as that investigation was in effect.

Q. Now, as a matter of fact, Mr. Eberlein, after your attorneys and your special representatives had made this investigation of these tax matters, you found that there wasn't very much trouble with the lands on account of tax matters, didn't you?

A. I paid very little attention to it after that; it dragged along, as I was informed from time to time—it dragged along for several years in the hands of Mr. Cotton, through a man by the name of Kollock, I believe.

Q. J. K. Kollock?

A. Yes. But the final outcome of it all was that a very small amount of land—some land was lost by that, and there was a considerable body of land that was subject to small—oh, unpaid taxes in some cases, tax title which were redeemed, and all that; but take it altogether, for the amount of time involved and the amount of money spent, if we had known what the land was, we would very much better have let it go.

Q. Now, as the result of that investigation, you found that, on account of the peculiar assessment laws, that is, assessing lands perhaps to a man who had purchased the lands under contract—

A. Yes, that is what I mean.

Q. And he had neglected to pay the taxes as required by his contract, that these lands had become delinquent, and that when the contract was forfeited, the company had overlooked the payment of taxes until probably tax sales had resulted, which required redemption? You found some instances of that kind, didn't you?

A. Oh, there were a number of instances of that kind. There were also instances of where land was deeded and the company continued to pay taxes.

Q. That is to say, where lands had been deeded away by the company, and the company's tax list had included those in a few instances, and they were being carried on the tax roll of the company?

A. Yes. Things had been run in that respect very

lax in the department. For instance, the land agent would send out a list to a county, a list of lands, and ask for extension of the current taxes, and the county officer in charge would find himself too busy, or otherwise engaged, to comply, and he would simply send back the list with a memorandum of the total amount; and instead of following the thing up, Mr. Andrews, who was then in charge, and a good man, but inclined to give everybody the benefit of the doubt, in his good intentions, he would simply make up his voucher for the full amount, and send it down; and so we found, in a number of cases, they had the receipt for taxes in a county for a year that didn't specify a single description of land and in that case there were sales made out of that surreptitiously; and by your advice, I know I made a redemption in a case of that kind.

Q. You refer to the Garbutt matter?

A. The Garbutt matter?

Q. Over in Curry County?

A. Yes.

Q. We redeemed in that case by paying the penalty and the purchase price and interest and a small consideration above, did we not?

A. Yes, sir. We paid enough.

Q. Now, didn't you find also this situation: that many times, or in some instances, if not many, the county assessors would assess the entire reported area of lands owned by the company in his county, in bulk?

A. Yes.

Q. As so many acres, say 200,000 acres, and it would be assessed in bulk, without any particular description of any particular quarter section on the assessment roll, and the taxes would be charged against the entire valuation, and when the company came to pay it, it paid it in bulk? You found that in some instances?

A. That followed. There was every kind of a variation of unbusinesslike methods that appeared in that investigation.

Q. That was the result of the improper assessment by the assessor, in the first instance?

A. Yes, sir. It seemed to be impossible to control the situation.

Q. In the later years, however, the lands were carefully listed and assessed by legal subdivisions, as I understand?

A. Oh, yes, I think so. It took some time to get them into businesslike shape.

Q. Now, you say that you reported the completion of this matter about March?

A. May I refer to this correspondence here to clear up that date?

Q. Well, just refresh your memory by looking at that correspondence. About March, 1906?

A. Well, I find that this was being done all through March. For instance, I find here a letter to Mr. J.

Kruttschnitt, who was director of maintenance and operation, advising him that I had sent to Mr. O'Brien, the Vice-President of the Oregon and California Railroad Company, a list of Congressional lands in Douglas County, Oregon, which has been corrected to date. That is the list I told you I had made contemporaneously with that map.

Q. That was reservation for railroad purposes?

A. No—well, that as for general purposes. In this case I sent it to him showing the tax situation. It was all printed, and we had a large number of copies, and we sent them out. I have also sent him a summary of the tax investigation, for use of the tax commissioners and attorneys employed to clear the company's title to these lands from tax complication.

Q. What is the date of that letter?

A. That is March 30, 1906. There are other letters, though, that appear a little earlier than that. They were sent in as fast as they were completed, each county by itself. Here is one in Lincoln and Washington counties. Here is a letter to Mr. O'Brien of January 26, 1906. There is one for Multnomah and Marion Counties, of January 10, 1906. I think the last went in about the 30th of March, 1906. We kept them going. There are some in December, 1905—December 26, 1905; December 13—and some even earlier than that. Anyhow, it shows that the utmost dispatch was had, and nothing was held up.

Q. Now, Mr. Eberlein, before this tax investiga-

tion was entered upon in this specific and general way, at the suggestion of Mr. Cotton, by reason of his belief that the records were in such shape as to justify the detailed tax search that you have referred to, had you taken any steps to announce the resumption of sale of these lands that were to be sold, and, if so, what notice or publication did you cause to be made?

A. Why, the first intimation I gave out that they would be for sale was in 1904.

Q. Yes, I understand, but you afterwards, in a talk with Mr. Cotton, found that you should make search. Now, did you give any notice of intention to resume sale in 1904, in the latter part of that year?

A. Yes, sir.

Q. What did you do in that respect?

A. Mr. A. L. Craig was at that time the general passenger agent of the Oregon Railroad and Navigation Company. Mr. Craig was interested in the settlement, of course, of all this territory, and we had frequent talks about the condition, and he was urging very strongly that lands that could be settled upon should be thrown open to settlement, and while there was very little land in this grant that would be available, still any movement at all would probably stimulate people to come in and buy land here, and settle.

Q. You mean lands outside of the grant?

A. Oh, yes, outside of the grant, in private ownership. So in 1904, right in that winter, that fall rather,

I inserted a page advertisement in a pamphlet in which this matter was called attention to.

Q. Do you remember what that pamphlet was or what its uses were?

A. Well, it was one of these highly colored flamboyant pieces of railroad literature. I don't remmeber its title. Lurid colors and lots of adjectives, I remember, that is about all.

Q. Sending out to eastern people?

A. Yes, all over, for general distribution everywhere.

Q. Advertising the promotion of immigration, etc., in this territory?

A. In this territory.

Q. That was published about what time?

A. In the fall of 1904 is my recollection.

Q. Then after this tax matter went under way, did you take any steps to discontinue your advertisements to sell?

A. Well, that had gone in. Mr. Cotton called my attention to that, and considered it a very grave mistake, and it did embarrrass me a great deal. There was no definite offer made in it, but it was calling attention to the conditions here, and that the sales would be resumed in the near future. Of course, the resumption of sales rested upon orders from elsewhere.

Q. Now, what happened shortly after March 30,

1906, when you say you had completed practically your reports on tax matters?

A. On the 18th of April, 1906, the earthquake and fire in San Francisco occurred, which destroyed everything that the land department owned in the way of records and correspondence. The only correspondence saved, I think, was about ten boxes of files like those you see here, partially charred and of very little value.

Q. Now, what happened to the tract books that you had prepared?

A. They were destroyed—had to be entirely renewed.

Q. What other records were destroyed, now? Just state, in a general way, what other records were destroyed belonging to the operation of the land department of the Oregon and California Railroad Company.

A. The tract books, deed records, sales records—every book and scrap of paper, the whole of its contracts, I think, none of the outstanding contracts, executory contracts which the company held at that time numbering several hundred—they were entirely destroyed, and the record had to be renewed.

Q. I will ask you to state, Mr. Eberlein, whether or not the company, by its acting land agent, Mr. Andrews, and his predecessors in office, and you as his successor, kept large leather bound books, in which were extended the duplicate of every executory contract made by the company, and upon which a marginal reference was made to assignments that might be made from time

to time, and whether, when you came into the possession of these records, you did not find several volumes of those which had been kept in due course, showing the duplicate contract retained by the company of all these sales?

A. You mean the record of it?

Q. Yes.

A. Yes, sir, there were such records. It was part of the record of the office to keep a sales record.

Q. Do you remember how many volumes there were from the earliest date down to the time you took charge in October, 1904?

A. No; but I remember that there were about seven thousand contracts issued up to that time.

Q. Do you recall the fact that one volume of these records, or two of them, were used and produced in court, and went to the supreme court of the state of Oregon in the case of Neppach against the Oregon and California Railroad Company, and that this large volume was filed as an exhibit in that cause, and was in the supreme court of the state of Oregon, and that it contained several hundred of these contracts at the time this Neppach contract was recorded and entered.

A. I remember very well, now that you recall it to my mind, of that record being taken from the office to be introduced as testimony, as an exhibit in that Neppach case.

Q. And do you recall that Mr. O. F. Paxton, who

was the attorney for Mr. Neppach at that time, had access to all these records, and that this volume was in the circuit court here, and also in the supreme court of the state of Oregon, and afterwards returned to you with the file marks of J. J. Murphy, Clerk, by A. S. Benson?

A. I remember the return and the file marks very well.

Q. Now, didn't that contract book contain several hundred contracts in addition to the old Neppach contract upon which that suit was based?

A. Oh, yes.

Q. Now, what became of all those record books?

A. Every record book of every description that was in the department on the 17th of April, 1906, was destroyed. That is my information in regard to it, or so badly charred as to be of no value at all as a record.

Q. Well, now, how did you restore these contracts and get any trace of them, and how long a time and what amount of work was it to do that? What difficulties did you surmount?

A. That makes the back of my head ache to think about it.

Q. State in your own way.

A. We found ourselves, the week following the fire, without any records, without any means of doing business. The contracts were gone. It was not expected that they would be recorded. The company

never recorded duplicate originals, unless it were for the purpose of a suit, or something of that kind.

Q. Executory contracts for the sale of land in this state are not required to be put on record, are they?

A. No, so I understand.

Q. Never have been?

A. Never have been. Nor were they in California.

Q. Recurring again to the employment of Mr. W. C. Bristol, was he not also employed to take over from my office at that time the collection and adjustment of delinquent contracts upon which there had been payments in default for a number of years?

A. Oh, yes—tried to make Billy earn his pay.

Q. Do you recall—in fairness to Mr. Cotton and to yourself—the fact that in September, 1904, Mr. Fenton was seriously ill?

A. I remember it very well.

Q. And that he was temporarily absent from his office for a period of about two months?

A. Yes, sir.

Q. And do you recall the fact that he did not actively resume business until about the first of May, 1905?

A. Well, I remember that he was absent for some time, and was reported seriously ill.

Q. And was absent by permission of his superior officers?

A. Oh, yes.

Q. Do you recall also the fact that Mr. A. L. Craig, who was general passenger agent of the Oregon Railway and Navigation Company, was the joint general passenger agent of the Southern Pacific line in Oregon at that time?

A. Yes, sir.

Q. Now just state to the court in your own way, in a general way, how you succeeded, if you did succeed, in finally reproducing the record evidence, or some record evidence, of some records upon which the company could safely proceed to administer these grants, and collect its outstanding executory contracts, and proceed with the performance of the same by making deeds from time to time as they were discharged or paid.

A. As I have already testified, in the making of these new tract books and records, I at the same time made up a classified list of all the lands of the company in these grants, and that list, in the case of the Oregon and California Railroad Company, was printed on green paper, long sheets, classified by section, town and range, and also by counties. It made a pile of paper comething like three feet high. That list I had sent to Mr. O'Brien to assist him, to give him information as he might want it of what lands the company owned.

Q. He was then vice-president of the Oregon and California Railroad Company?

A. He was then vice-president, and that list was

classified as to patented, unpatented, selected, unselected, unsurveyed lands, and was a transcript of the books, at the time that it was made. It of course changed every day. In the office that list was kept even with the record every day, changes made, as they were made in the record they were also made in this list; but of course in the case of a list being sent, as this was to Mr. O'Brien, no change was possible. He was not advised when we made a deed or took patent, or lost land, or anything of that kind. That list also had a classification by counties, and by section, town and range, of all sold lands subject to unpaid contracts, and opposite, as I recollect it, the description the number of the contract was given, but that was all the data there was. Now, when the fire came along, Mr. O'Brien notified me that he had the list.

Q. Where was Mr. O'Brien's office at that time?

A. Here in Portland.

Q. Had been all the time?

A. Had been all the time. And to that one circumstance alone, we owe that we were able to begin operations within six months from the time that the fire took place, and give notice of the sale of such lands as we were able to sell at that time, which would be agricultural or grazing lands. We could not sell timber land, because our cruising reports for about forty years had been entirely wiped out by the fire.

Q. Now, these contract numbers shown on this list would give you, you say, the number of the contract.

Would it also give you the name of the vendee?

A. Gave no other information except the description of the land covered and number of the contract. Of course, if we had anticipated any such thing as occurred, why, we would have put more information, but all we could do in that case was to examine the records of the counties. The examination was made—had to be made again of the United States Land Office records. They had to be abstracted again so as to show the change of land between the date of this list and the date of the fire, at the time the examination was made, to show the changes in regard to patent or loss of land, or other complication—governmental complication. Then we had to examine every recorder's office in every county in which any of the grant lay, in Washington and Oregon; and then we also examined the deed records and the contract records for every year since 1866 in all those counties. In that way we were able to supply a lot of missing information. For instance, we reorganized or restored our deed record for one thing, but it so happened that, in a very large number of instances, the deeds given in years past had not been recorded. In a great many cases it arose from ignorance, and in a great many cases from intention.

Q. You mean people who had obtained deeds from the company would retain them off the records?

A. Keep them off the records, yes. And from the currency that was given to the catastrophe that had happened to us, a search began to be made by the

people among their papers, and very often they found that they had mislaid them, very often they had been lost, and there was an immediate demand, and a very insistent one, for deeds, which we were wholly unable to act upon, and it took months to make these examinations of county records. In that way we found that in some cases an inconsiderable number, but still it all helped, that the vendees had recorded contracts, which, of course, were not entitled to record, but still had been accepted and recorded. Well, that helped us somewhat. But the struggle to restore missing information took us all over the United States and down into Canada, and we had to send everywhere. The people holding contracts, in the vast majority of instances were very kind and agreeable, and sent their contracts in.

Q. Allowed you to make copies of them?

A. To allow us to make copies of them and restore our records. And only in a very few instances was any attempt made to take advantage of our condition. In some cases it became known that we had lost our duplicate contracts, and the vendees holding them committed the offense of altering the provisions in some cases—very few, though.

Q. Well, in fairness to the public generally, you would say that there were only a few rascals like that?

A. But very few. The public generally responded, and did everything they could to assist us.

Q. Now, about how many would you say were there of those unrecorded deeds, which happened to go upon

the record after the fire, just roughly speaking?

A. I couldn't make a guess.

Q. You recall there were some instances?

A. Oh, there were a number of instances; they kept cropping up for several years—demands for deeds on the claim that they had lost.

Q. I understand, but you spoke about some deeds being in existence after the fire, in the custody of the grantee after the fire, that found their way to the record. Now, there were not very many, were there, of that kind?

A. I cannot say. Of course, they would slip their deeds on the records of the county where they were and that would not become known to us, nor would we be posted. We probably caught them when we made our abstracts from the county records.

Q. Now, as to the deeds which were lost, and for which they desired new deeds, in those instances, where the grantee made a bona fide showing and submitted an abstract of title showing that he was entitled to a new deed, did the company regularly execute deeds of further assurance?

A. Why, that is a matter that I left entirely in the hands of the law department for the grant, and took the advice of the attorneys. In those cases they satisfied themselves as to the bona fide character of the applicant, and as to whether he was entitled or not. In some cases I understand the suggestion was made of a friendly

action, and an order of court that would protect the company.

Q. Yes, in some instances they brought a suit to restore their title or establish the existence of the muniment of title that had been lost, and in other instances the company made quitclaim deeds.

A. I believe at the time I left all connection with the land grant in 1908, I think in all the grants that were under my control something like 20 tracts of land remained which we had been unable to discover the grantee.

Q. Yes, to discover who was the grantee.

A. Yes, who was the grantee.

Q. Now, this brings the matter down to what period of time? About when did you succeed in getting your records restored, and to be in condition for a second resumption of sales of these lands?

A. There was an immediate and fierce onslaught on the office before the remains of the city was cool, for a sale of lands—timber lands.

Q. By whom were these applications? What class of lands were applied for? Who were the people that were wanting these lands?

A. Well, the Booth-Kelly Company was extremely active and insistent. Weyerhauser Timber Company wanted land right off quick.

Q. Well, were these people that were applicants

for the purchase of lands intending settlers, or were they timber investors?

A. Oh, just investors in timber—speculators.

Q. Now, when were you, with your records thus destroyed and finally restored, in condtiion to proceed with sales in the regular and orderly course, outside of timber lands, I will say, if there were any such lands?

A. The fall of that year the rumpus and noise had grown to such an extent—

Q. 1906?

A. 1906, the summer of that year, that in the latter part of August, I think, I notified my superiors that we could act upon such applications, as we had information or could get it quickly, and we also gave notice at that time by circulars to all that we would sell agricultural lands such as we might have, or grazing land, just as soon as the application could be examined; and as to timber land we were not in a position to sell timber land until such time as we could restore the necessary data upon which to act intelligently, and that was being done as quickly as possible.

Q. You refer to the cruising of the timber lands?

A. Yes, sir.

Q. Now, pursuant to this notice that you were prepared to receive applications from persons desiring to purchase any of such agricultural lands or grazing lands as the company might have, and that upon investigation of these tracts, if they were found to be such, that a price

would be given, could you say to the court approximately about how many such bona fide applications were received and acted upon before you left the company's service in 1908?

A. I don't remember any that were acted upon.

Q. I mean that were received of this class that intended to apply for agricultural or grazing lands, excluding now timber.

A. I don't remember any.

Q. Now, isn't it true, or is it true, Mr. Eberlein, that whatever applications were made for the purchase of lands, were applications to purchase lands that were chiefly valuable for timber, or in some instances, in Jackson and Josephine counties, lands that were thought to contain mineral prospects, by miners and others of that type?

A. On examination of these so-called agricultural applications, they were found to be in cases mineral; in almost all cases—in the vast majority of cases, simply timber, and in the remainder of the cases water power.

Q. Now, isn't it true, or is it true, Mr. Eberlein—you may state in your own way—that the agitation for a forced sale, or to force this land on to the market, began in the preliminary campaign for the election of the legislative assembly of 1907, which took place the first Monday in June, 1906?

A. Yes, sir, it began in the summer of 1906, and the fact that we were helpless was disregarded, and

brutally so, by a great many people down in these valleys.

Q. Do you recall the fact that in Jackson county, the campaign in that county was made by the two political parties, from which Senator Mulit was a state senator who afterwards introduced and secured passage of senate joint memorial 8 in the legislative assembly of 1907; that the canvass in that county took the form of an agitation against the Oregon and California Railroad Company because it would not restore to sale these so-called agricultural lands—mineral lands in Jackson county? Do you recall that agitation?

A. I recall that agitation you refer to, and I also recall the fact that this agitation was made the basis of a congressional campaign—as to whether that year or later, I do not know—in which one Hawley campaigned on the basis of this agitation.

Q. Do you remember that there was some action obtained from chambers of commerce and commercial bodies, and other influential bodies, calculated to—calling upon the legislative assembly or congress to take action?

A. As near as I could get at the facts, and I believe they are true, the threats that emanated from particularly Booth-Kelly Lumber Company that we would be forced to let go, and all that sort of thing—the agitation started, I believe, at Eugene, the headquarters of that concern, and was regularly worked up among these commercial bodies all down through the valley, and I remember having correspondence with a man by the

name of Eggleston, I believe, who was secretary of the Rogue River Valley something or other association, demanding immediate restoration to sale of all the lands in the grant, and I simply wrote him, and gave him the exact facts and conditions as they were.

Q. Do you remember that Mr. A. C. Dixon, represting the Booth-Kelly Lumber Company, was an active promoter of this agitation in 1906 and 1907?

A. Yes, sir. He also came to San Francisco and made demands to see records and all such things that did not exist at that time, and did a good deal of talking. He was also present at the hearing of the land committee of the house of representatives at Washington, held, I think, in 1907, and was present there with Mr. John W. Blodgett and Arthur C. Hill.

Q. Who were they?

A. They were officers and large owners of the Booth-Kelly Lumber Company, and Mr. Dixon was there representing, and did a great deal of talking, and as I recollect it admitted openly before the committee of the house that his concern had taken the lead, and had secured and fomented this agitation, and that was the understanding conveyed by him to that committee and all before it.

Q. He made a statement, did he not, before the committee that was published as an official document?

A. Yes.

Q. Now, who were the Booth-Kelly Lumber Com-

pany? That is, what interest had they in all this matter?

A. The Booth-Kelly Lumber Company, when I first began to examine into the affairs of this land grant, were very active in the manufacture of lumber, and they had mills—large mills, I believe, at Eugene and at Springfield, and Wendling, I believe at that time. I may be mistaken as to just those names, but that is my recollection. They were also acquiring very largely timber down through their section of the country, and they had acquired, as I discovered at that time, directly from the railroad company about 70,000 acres.

Q. That is from the Oregon and California Railroad Company?

A. Yes, sir. The reason for my examination into their affairs particularly was the bitter complaints that were made by other large timber buyers and owners, of the favoritism which they claimed was extended by the railroad company to Booth-Kelly Lumber Company. They certainly did have some exceedingly favorable contracts. They bought land with timber on time, with very little cash payment, and at such prices which even at that time created a credit upon which they could raise money. All those things were known all throughout the lumbering circles on this coast and in the East, and many complaints were made in regard to it; and it is their large holdings, and their determination to get the inside track and keep it (as they had it at that time so far as railroad lands were concerned) that made them very insistent, and so much so that they rather assumed

to dictate the affairs of the Land Department.

Q. Did they or did they not insist to you upon sales of further lands to them, to fill out their holdings in Lane County and elsewhere?

A. Yes. Their purchases from the railroad company had been made in such a way that I thought it necessary to call the attention of my superiors in New York to the system which they had pursued. For instance, in sales of 20,000 acres, they would go through three townships, and take a string of forties down through the center, in some cases, of a section, take a piece off another section, and so on down through the entire purchase, and in that way they beat down the value of the remaining timber, and they then came in immediately on the heels of it, and would say, "Now, here is the rest of the timber in these townships, and nobody will want it, nobody can use it but ourselves. We will give you $2.00, or some such price, an acre for it."

Q. Were those applications favorably entertained by you?

A. No, sir. I believed that the Booth-Kelly Lumber Company had all the timber at that time that was necessary to a profitable operation for a great many years to come, and that disposing to them would only foster a monopoly, and that in the end it would result in curtailment of product, and it would be an injury both to the state and the railroad.

Q. There has been some complaint made here that the Oregon and California Railroad Company, through

the dominance of the Southern Pacific Company or otherwise, had created a land monopoly here, and that this land monopoly had interfered with the development of Western Oregon. Now, referring to the timber lands, Mr. Eberlein, I would like you to state to the court, from your knowledge and experience and observation, and from actual transactions, why it was desirable and necessary for this company to reserve about 100,000 acres of these timber lands for its own use, for ties, bridge timbers, etc.?

A. I believed that the railroad company should protect itself while it could in regard to necessary supplies of timbers and ties. It had this considerable body of timber, which was fast disappearing from its ownership, and that I could see, from having run out the purchases that, for instance, the Booth-Kelly Lumber Company had made, and the Hammond & Winton purchases, that were afterwards crystalllized under the Weyerhauser interest and some other interests that I could mention, and having followed the thing out through county records to see whether these same large interests were not consolidating the even numbered sections in their holdings, I found that to be the case. That was my own investigation, and in that way it appeared to me that the timber of Western Oregon was gradually becoming consolidated into a few large holdings; that the result might be very detrimental to the railroad company, and of course to the people of Western Oregon, by reason of increase of rates which must necessarily follow increase of operation cost; and for that reason that 100,000 acres

of timber was set aside to be a perpetual reserve for the protection of the railroad company from extortion. Now, that was the reason for that reservation, and that reservation itself for that purpose is evidence of the intention of the railroad company to depend on that, but not to retain the ownership of the remaining timber land.

Q. Now do you recall the circumstance following the fire where ties were one price, and where the tie was immediately advanced by timber manufacturers in Western Oregon?

A. They were jumped, as I recollect it, from about 22 or 23 cents to 63 1/3 cents over night, and the threat was that they would go to a dollar.

Q. Who were the large timber holders? I mean, who were manufacturing railroad material in Western Oregon at that time?

A. Largely Booth-Kelly Lumber Company; and the railroad depended upon them largely—had to—for its supplies.

Q. Did you ever examine the rating of Booth-Kelly Lumber Company, to ascertain their financial rating, and what it was?

A. I don't recollect of having made any examination of that kind, though I think that the ownership—the control, I should say, passed from the individuals who were in control when I first came here, to this Bay City or Menominee crowd, of Blodgett and Hill, Michigan operators.

Q. That is to say, the Booth-Kelly Lumber Company stock, and the control of that was disposed of by John F. Kelly and R. A. Booth, or a majority of it, and passed to Michigan timber investors, who now own the property?

A. Yes, sir, I think so.

Q. Do you recall the fact that Mr. Hawley, that you referred to, was Honorable W. C. Hawley, a professor in the Willamette University at Salem, when he was elected to Congress from that district?

A. Why I don't remember. I thought he was a preacher or something of that kind.

Q. No, he was Professor of History in the Willamette University, a Methodist institution at the capital of the state, and was elected to Congress from that district.

A. He was elected to Congress, I know. I believe he is still an incumbent.

Q. Do you know, or can you say whether or not he was affiliated with and a political associate of Senator Booth, who was one of the controlling men in the Booth-Kelly Lumber Company, about this time?

A. I understood that he and Mr. Booth were very friendly. They were both of the same faith, and prominent in those circles.

Q. The same political party?

A. Yes, sir.

Q. And Mr. Hawley is the present Congressman who has been rather active in the procurement of the passage of the resolution of April 30, 1908, under which this suit is being prosecuted?

A. Yes, sir.

Q. And also somewhat active in securing the passage of what is called the "innocent purchasers" bill, by which a million acres of these lands that have been passed to these large holdings, have been confirmed in these holdings upon payment of $2.50 an acre, by stipulation of the attorney general?

A. Yes, sir.

Q. You speak of the number of acres approximately that the Booth-Kelly Lumber Company acquired from the Oregon and California Railroad Company. How early were these first contracts made, in a rough way, would you say?

A. Subsequent to 1898, I should say. That is my recollection.

Q. And how late would you say was the last contract? I am not asking you to give an accurate time, but approximately and as your memory serves you?

A. The last contract made directly by the company, it seems to me was made about 1902.

Q. Do you recall, Mr. Eberlein, about the total holdings of the Booth-Kelly Lumber Company of timber lands outside of the 70,000 acres which they acquired from the Oregon and California Railroad Company in

that vicinity?

A. I had an examination made of the records of those central counties there—Marion and Douglas and Lane, and probably as far down as Jackson and Josephine, to find out what they had acquired. I knew what they had from the Railroad Company, which amounted to about 70,000 acres at that time. I found a large number of assignments of small contracts—railroad contracts, contracts to individuals or small concerns—and I found also the transfer to them of a large number—I say a large number—a considerable number, as I remember it, of timber entries that had ripened into titles—understand I don't mean that there was any collusion, or to suggest anything of the kind, but what on the record appeared to be perfectly proper purchases by them from individual holders who had taken title directly from the Government, or from the railroad of such, and it amounted to about 100,000 acres, as I remember.

Q. That is including the 70,000 acres?

A. Yes, including the 70,000 acres.

Q. Now, you found, did you or did you not, by this investigation, that the Booth-Kelly Lumber Company had succeeded in obtaining title to numerous or several homesteads down in these timber belts?

A. Yes, sir, I think so.

Q. And others were under the Timber and Stone Act, do you think?

A. I think so. I had them, I remember, platted in different colors to show the different class.

Q. Now, I wish you would state to the court whether there is any other, or was during that time any other large manufacturing timber company in Western Oregon south of Salem, other than the Booth-Kelly Lumber Company?

A. I don't remember of any.

Q. I mean outside of the mills on the coast.

A. Yes. So far as mills within this grant are concerned, I do not think there were any of any size. There were a few that had bought timber, a small amount of timber, but they were inconsiderable in size. My recollection is that Booth-Kelly Lumber Company, in their operation, had taken up, bought the lands of some small mill proprietors, and shut down the mills, consolidated in their large milling operations at these different places on the Willamette River—the upper river, at the head waters. And I don't think there were any. The railroad company depended largely, had to depend largely on them for its supplies, and at the time of the fire they immediately shut off those supplies and forced the railroad company to establish mills of its own.

Q. Where were those mills established?

A. Those were established at different points—I cannot tell you just now, but in the neighborhood south of Eugene.

Q. At Marcola, in Lane county?

A. Marcola, yes, that is one place, Lane county. I think that was run by Fisher Brothers. We established mills at different points down throughout the grant, for the purpose of supplying ties and timbers.

Q. They were not commercial mills, were they, at all?

A. Not at all. The operation of lumber business is ultravires, as I understand, and not possible for a railroad company; and those mills are operated at a serious loss, simply because the railroad company could not take advantage of the market—could not sell its seconds and stuff of that kind, which make a margin of profit in commercial mills. And those mills were established and operated simply because Booth-Kelly and other operators refused at once to furnish the railroad company with necessary supplies to keep its lines open, except at most ruinous prices, which could not be considered.

Q. That is to say, the mills on these lands of the Oregon and California Railroad Company were operated for railroad purposes, to manufacture ties, bridge timbers, and other material necessary for renewals and betterments of the lines, and were not operated for commercial purposes.

A. They were not operated for commercial purposes at all, and were operated simply by reason of the company being forced to operate them, by the action of Booth-Kelly largely, and other mills too; but Booth-Kelly was the principal supply, and it was immediately

cut off.

Q. Now, you spoke something about Mr. Dixon being at Washington at this particular time. Have you any personal knowledge of his being active before the legislature of the State of Oregon for 1907, or do you know anything about that?

A. Only by hearsay. That is all.

Mr. Townsend: The Government objects to all of the testimony of this witness as to the circumstances leading to the adoption of the Joint Memorial of the Legislature of the State of Oregon in February, 1907, addressed to Congress and the Executive Officers of the United States, and also leading to the adoption of the Joint Resolution of Congress, approved April 30, 1908, directing and authorizing the institution of this suit, and also the recent act of Congress authorizing a compromise of the so-called purchaser suits; also all testimony relating to the action of the Booth-Kelly Lumber Company and other lumber companies with reference to the sale of ties and other building material to the Railroad Company; also the efforts on the part of these lumber companies and timbermen to purchase lands from the defendant Oregon and California Railroad Company; also all other testimony implying that the agitation resulting in the institution of the present suit was brought about by or on behalf of these timber men and mill operators by Congressman Hawley, Senator Mulit, or anyone else, for the purpose of enabling these timber men and mill operators to acquire a monopoly of

the manufacture or sale of lumber in Western Oregon or any part thereof, upon the ground that the same is hearsay, incompetent, irrelevant and immaterial and was elicited from the witness by questions calling for mere conclusions and arguments and not for facts within the knowledge of the witness. For the purpose of avoiding the incumbering of the record objection was not made specifically to these questions at the time they were propounded, under agreement with counsel that the general objection could be made at the conclusion of this line of testimony as to the whole thereof and it being understood that the same shall be considered as having been interposed as to each question and answer as well as to the whole thereof. Unless you have some objection I am going to adopt that general objection to avoid the incumbering of this record.

Mr. Fenton: None at all. I was going to say that counsel for the defendants desires to say that the defendants do not admit that the statement by Government Counsel is a fair statement of the facts as testified to by the witness, and that the objection made by counsel is in a sense argumentative, and the defendants desire the record to show that they object to the statement as not in accordance with the testimony disclosed by the record, the record showing that the witness was present and participated personally in many of the matters about which he testified and that the record will speak for itself. We make no objection that counsel reserved his right to object at this time.

Mr. Townsend: Yes, but I want the record to show

that this objection shall be considered as being addressed to each question specifically.

Mr. Fenton: Oh, yes; it may be so understood.

Mr. Townsend: And each answer.

Mr. Fenton: It may be so understood.

Whereupon witness further testified that as to the sources of his information, or information received from others as to the general character of the unsold portions of these grants involved in this suit, he would just say generally in the beginning that a large part of the grant had been cruised and examined and reported on and the reports covered not only the character and the amount, the condition of the timber, but also the character of the land. They attempted to report upon the general character of the land as land. These reports were made during a period of time from 1870 down to the time of the fire (April 18, 1906) and so far as he could judge from the character of the reports that were on file when he took possession, the reports were made by men who were in the employ of the Company in the capacity of cruisers for years together, which would argue that they were well made and consecutively made in a great many cases. As to the cruisings done under his own control and direction, he could speak of those. As to his personal examination of the grant he cannot say that he has been over the entire grants, but has been through the grants in different places at different times from 1902 down. In February and March, 1903, he made a trip through the upper part of the grant, Clackamas, the upper part

of the country below, back through the grant, back out of the valley; that is where the lands of the company are. He had been across the grant, across the Cascade Forest Reserve through the Company's lands on horse back where there were no trails, looking after the character of the timber and the land, everything connected with it. He has been in different parts of the heavily timbered part of the grant, the valuable part of the grant, repeatedly through it; that is, in the southern part of the State. He has been a land owner and a rancher down in Klamath County adjoining the grant for the last seven years. He knew something about the character of land and what it will produce and its capacity for production. He has dealt in land for a good many years in one way or another. He is not a timber cruiser, but has been through these grants in different places to examine the stand of timber and the character of it. The cruising done during his control of the grant was by men formerly in the employ of the Company when he came there and they had been for years in that particular branch of the business. N. E. Britt was the chief cruiser and F. A. Elliott was under him. Both left the service while he was still in control, several years after he came here. A. W. Rees, he believes is still in that capacity with the Company, and then there were quite a number of others whose names he does not remember, who were taken on or off just as the occasion would require. He has been through the timber lands in the grant owned by the Company in the eastern half or part of Jackson County, Oregon, and in the western

part of Klamath County, Oregon, known generally as the Jenny Creek country. He made reconnoissance of the Klamath River Country once and reported on it from Klamath Falls down Klamath River. He has never been to Coos Bay. Never in that part of the grant and has not been on the water shed west of the Coast Range. In California he has been immediately below the line and knows the general character of the country. He has been in the Cascade Forest Reserve in the eastern part of Multnomah and Clackamas Counties and went through that property and the intermediate lands of the Oregon and California Railroad Company pretty thoroughly once with Mr. Pinchot. He has been in the Cascade Forest Reserve clear down to 48 south, somewhere down in there, very near the State line; that is, to fractional section 41, which is the Oregon boundary. He has been through the southern or lower end of the Cascade Forest Reserve and the lands of the Company within the indemnity limits and abutting on the west of the indemnity limits on the east side of the grant adjacent to the Forest Reserve and through that country repeatedly. He is not familiar with the western side of that part of the grants. He has not been in Yaquina Bay through Lincoln and Benton Counties. These are not very valuable lands and he never took the time to go near them. Has not been on the granted lands of the West Side land grant. Does not know those lands (Referring to grant of May 4, 1870). The general character of the land that he has been over in the grant of July 25, 1866, the northern part of that grant, the extreme

northern end of that grant, that is about east and southeast of Portland, there is some very heavy timber. It is rough country and no large agricultural possibilities at all. As to the south end of that grant the land—practically all the unsold land—lies in the mountainous country or rough country, very much broken. The best part of the timber lies in the extreme southern end of the grant; that is the sugar pine country in Jackson and Klamath counties, but that country lies high, very dry and is cold. There are practically no possibilities in there, for extensive cultivation, because the land is not suited for it, the character of the land is thin and sandy. It will be a forest country always, and in his opinion it would not be susceptible to cultivation on account of the climatic conditions and soil, rock, etc., even if the timber were removed. He cannot speak, except in a general way, of the lands in the eastern part of Josephine County, east of the railroad and immediately north of Jackson county, having skirted that country east of the range. The general character of this land is timber and wood land very rough and broken. The land in the eastern part of Douglas County on the Umpqua River and the streams that lead into the North and South Umpqua, is a good timber country. It is all timber, practically. The valleys are narrow and it is valuable chiefly for timber, so held to be now. The timber lands in Lane County on the head waters of the Willamette River, Coast Fork, Middle Fork and the McKenzie are good timber lands, but in a rough country. what there remains. There are small patches of land all through the country,

isolated tracts here and there, where, if the timber was removed, the land would be susceptible to agricultural purposes, but the country is full of land, the Willamette Valley is full of land, covered with brush now, that is very much better for cultivation than any lands that he knows of, in this grant and more accessible to transportation.

If for no other reason the stumps would be prohibitive to the adaptability of this land for agricultural purposes, because of the character of the growth, especially the fir growth which is the principal growth of the country tributary on the slopes into these interior valleys on the west of the summit of the Cascades and that by its resinous character, its long tap roots, as everybody knows in this part of the country, are exceedingly hard to extract, and it costs from fifty to one hundred and fifty dollars, that has always been his information, to clear the land of stumps and there is plenty of land to be had in these interior valleys for less than that price. Well on toward 200,000 acres of this grant is rough, is absolutely barren, rock slopes, without any possibility of growth of any kind. He would call it chaparral down in the lower country. The land that he speaks of has not even chaparral growth and would not even be goat pasture and there is no value at all to that land that he knows of. You could not settle a colony of flies on there and get sustenance for them. He thinks it would not be valuable for a homestead or preemption if it were to become public land. It is just waste land, that is all. He can give only a general description of that land. He

cannot give the particular section, township and range descriptions. He can only give the general locations. The company is still paying taxes on this land, they were when he was there, such as have been surveyed. Shortly after the fire, the Weyerhauser Timber Company made an application to purchase all the timber in certain townships, he cannot name them now but they are in the townships from the state boundary north, part lying particularly around Pokegama, which is their center. They own about 12,000 acres of land there, which was originally purchased from the Railroad Company by a man by the name of Cook, he believes, which passed to Hervey Lindley, who built that little line of road from Thrall Junction on the Southern Pacific main line north into and across the state line into Oregon, with a terminus at Pokegama, where Lindley had some kind of a mill operation; and before this time the Weyerhausers had acquired that little railroad and that timber holding of Lindley. They made an application for all the land in these townships, aggregating about 50,000 acres, as he now recollects, and they wanted to buy it right off, and his belief is that they offered about $5.00 an acre for it. Their application was entertained and it was pushed very vigorously by the Weyerhauser people. This came to him through Mr. Calvin; then there was a great deal of correspondence back and forth between himself and Mr. Kruttschnitt, who took a hand in it and Judge Cornish. Witness protested against taking any action at that time, because the company was wholly unprepared. The company had no cruisings of that country at

all and could not act intelligently, and it was the heaviest timber in the grant; being the sugar pine belt and practically the only body of sugar pine that the Railroad Company had. The pressure was very heavy, and finally he got an order to have the land cruised and have it done with the greatest possible dispatch, which he did. He ordered Mr. Rees down there and the company got as many cruisers, that it could depend upon, as possible. They established two, probably three, camps in that district and cruised it that summer and late in the fall of the same year, 1906. He found that they had asked for just the nucleus of that country; with the 50,000 acres that they wanted, there was tributary and depending upon it, about 70,000 acres more than would either have to go with that sale or else become of very little value, because it would be worthless to anybody except the Weyerhausers; that is it could be sold for very little. So that was included. He submitted the results of that report and the whole negotiation flattened out and was never resumed. That is to say, when his final report was turned in, the application to purchase by the Weyerhousers, was denied. There never was any negotiation for the sale of the grant entire, to any one that he knows of, but he cannot say that there were no negotiations with Weyerhausers or any one else during his time, that he was not cognizant of, but he believes that he knew everything of the kind that was going on. The company never made any attempt to sell the grant as a whole to anybody, and there never was any application that he knows of, to buy it as a whole. He does not re-

call anyone who ever applied to purchase so large a body of land as 50,000 acres, other than the Weyerhauser Timber Company referred to. There were some small sales made after the discontinuance of sales in 1904, up to the time he retired from the management and control of the companies—to timber people. Some small sales were made to timber people. He refers to some small timber sales that were made subsequent to April, 1906. These were sold to the Southern Pacific and by that Company were sold, he thinks, to Cole Brothers, and to Fisher Brothers, at Marcola, and other small mill men. The sale of these lands to these parties in connection with the mill manufacture of lumber for ties and bridge material, was part of the means the company was obliged to resort to, to keep the lines open during that period of the rebuilding of San Francisco. Those mills were entirely additional, to the mills that the Southern Pacific Company itself established. These small sales referred to represent just a few sections; a half dozen sections would cover it. The letter of August 16, 1905, addressed by him to Peter F. Dunne, General Attorney, Southern Pacific Company, being Government's Exhibit 115, had nothing to do with this case. This is the letter that was published and it has nothing to do with the Oregon and California lands even remotely. That letter and the correspondence going before and after between himself and Mr. Dunne and other officers related entirely to a proposal at that time to transfer the lands unsold of the Southern Pacific Railroad grants in California to a land company and the occasion for that suggestion at that

particular time was the fact, that the issue of bonds of the Southern Pacific Railroad Company of California, dated in 1875, matured, he thinks, the 1st of April, 1905; at any rate they matured that year. A refunding issue was in process of being put out to refund these matured obligations. The old issue of 1875 was a lien upon all the lands of the Company, that is the Southern Pacific Railroad Company. It had nothing to do with this company in suit, and it became necessary in drawing the new deed of trust to secure refunding bonds to include the usual provisions in regard to the security, the land grant security for these bonds and the manner in which it should be handled, the same thing that is usual and customary in such instruments. During the discussion of the deed of trust the suggestion originated, to divorce entirely these lands from this refunding issue, to turn the lands over when they were relieved from the lien of the old issue into a land company. It had no relation whatever to the Oregon and California Railroad Company grants in Oregon. Something is said in that letter, which stated that, "Mr. Chambers has undoubtedly looked this matter up. He makes no citation to Department Decisions but I think this matter can be brought about by conference with the officials at Washington, who are just now inclined to be friendly to us." D. A. Chambers was an attorney of the Southern Pacific at Washington, attended to all departmental matters referred to him by the land department and other departments. The whole question involved and the one that was submitted to Mr. Dunne and myself,

was a practical one as to how or whether these grants could be transferred by the Railroad Company, the original grantee, to a grantee of the Railroad Company, and whether such grantee of an entire grant would be subrogated to all the powers and privileges as to the selection of indemnity for lost lands enjoyed by the original grantee under the acts of Congress. The question was a complicated one, necessarily for one reason, because of the intense complication that had arisen in that particular grant, those two particular grants to the Southern Pacific Railroad Company, out of suits brought by the United States, a number of them, in what is known as the Overlap Litigation. The United States had made an alternative grant to the Southern Pacific Railroad Company and to the old Atlantic and Pacific Railroad Company. That was one suit out of which, or one condition of facts, out of which, grew several suits. In that case the lines of general location of those two roads when first projected were very near coterminous; they crossed and recrossed; and although the Atlantic and Pacific never did construct a foot of road in California, still some of those old alternative rights survived and were cut off finally by action of Congress in 1886, he believes. However, the Government of the United States set up the most unusual charge that notwithstanding the grant was forfeited, the Southern Pacific had constructed and had earned its grant, the United States insisted that it step into the shoes of the old Atlantic and Pacific grant which never constructed, and therefore brought a suit and finally prevailed. He merely cites this to give an in-

stance of the character of the complication that existed at this time and that is referred to in this letter. That involved the practical question whether or not an assignee of a grant under one of these acts of Congress would be recognized as the beneficiary of the grant in the readjustment of claims in relation to the payment of fees for lands, selection of indemnity, and so on and so on, and obtaining patents to lands that were not patented, and whether they could surrender base lands lost and take indemnity, the same as the grantee company. By the term "friendly" he did not mean anything improper. He never was mixed up in anything improper that he knows of, certainly not with the United States in regard to land matters. The question there involved was simply this: The facts mentioned were notorious throughout all the departments, beginning late in 1904 and from that on during the whole Roosevelt administration, and he thinks, the present administration has inherited that tendency. The Departments at Washington were exceedingly hard to deal with. He means that when one would go to talk with the head of a department about the ordinary business of the department—he knew it was so in his case—before he could get a hearing, the attorney for the department and two or three witnesses, had to be brought in to hear what you had to say. He thinks —the suggestion seemed to him that being an official of the Harriman lines, one was under suspicion, and the heads of the department evidently thought that somebody might report it to the head "Bull Moose" and he would go and toss them. The whole air was charged

with suspicion. It was hard to deal with them. It was hard to get anything through the departments. He does not care to go into details very much except to clarify the statement. The condition of affairs existed that he speaks of. In January, 1905, the first Forestry Congress was called in Washington and the railroads were all invited to send delegates, and they represented a large, as they did in these grants, a very large interest in forestry matters, but in that case there was not a single representative of any of the Harriman lines that was asked to participate; they were shut out and snubbed in every way; and it only emphasizes the unfriendly situation in which he found the affairs at Washington—the Government officers at Washington. During 1905, the Reclamation Service, in January, 1905, and the head of the Geological Survey made very insistent appeals to him for assistance, in getting certain things through the Oregon and California legislatures in regard to the Klamath Irrigation project. They had spent $90,000 in making surveys and examinations, and had to get the co-operation of the states of California and Oregon in releasing and conveying such rights as the states had, in these interstate lakes to the United States before that project could be put on its feet. That is one of the things. This finally resulted in the passing of acts by both California and Oregon, granting the rights of the states to the United States. They did everything they could to assist them at that time, and it was to the work done by the Railroad Company that the Reclamation Service and Geological Survey owe their

success in that matter wholly. During that year Mr. Pinchot came to California, just about this time, just before the time this letter was written, and he made a formal request, that the Oregon and California Railroad Company should deed by absolute conveyance to the United States all of the lands granted or claimed by the Railroad Company in the southern end of the Cascade Forest Reserve in Jackson and Klamath Counties, Oregon; embracing probably 400,000 acres of the very best timber land in the grant, carrying all the sugar pine, the best belt of sugar pine there is, in Oregon today, and that was to be turned over, and the consideration offered to the Railroad Company for such a proposed transfer, was the privilege of cutting off its own timber on those lands whenever and subject to such conditions and regulations as the Forestry Bureau of the United States might impose. The object of Mr. Pinchot, as Chief Forester, in securing this land, was to make a permanent forest reserve, and when the timber was cut off it would be valuable for reforesting. The elevation of these lands is 5,000 feet and over, and agricultural crops would be very limited in that region and he doubts very much whether one could raise profitably any crops in that particular country. That proposal was made to him verbally by Mr. Pinchot in San Francisco and was afterwards renewed by him in New York, and was afterwards renewed in writing to him, and he supposes the papers are in the department now. It was renewed by Mr. Pinchot and made by him, as an official of the United States, as he was then Forester of the De-

partment of Agriculture, formerly of the Department of the Interior. But what he had reference to in that case was simply, that the friendly disposition of these gentlemen was so much in contrast with the notoriously unfriendly attitude, not of the gentlemen personally because they are very courteous gentlemen, and he has had the very most pleasant social relations with them, but as officials they were very, very hard to deal with, and their attitude at that time was such a strong contrast to the atmosphere in which they lived in Washington that it was worthy of comment. He alluded to the changed situation when he used the word "friendly," and if they wanted something out of the Company, why that was the time to get what the Company needed. At that time the Company wanted to have recognition of the department that this grant would be assignable and that the holding company would have the same rights that the land grant company had as to selections and obtaining patents, and things of that kind; perfectly proper in every way and a business proposition. Referring to Government's Exhibit 113, the Company was not in a position to entertain applications to purchase from any of these gentlemen, and he has explained heretofore the reasons why the Company was in no position to offer these lands for sale, or to sell them. These letters, Government's Exhibit 113, are all requests for transportation, trip passes and things of that kind. They are just the common run of stuff, of that kind, with which the departments are always flooded. When he received these applications, he notified them that their applica-

tions would be examined as soon as possible, and they generally were examined at once and if found to be agricultural or grazing, as they were in a few cases specified to be, he notified them, the Company would enter into negotiations with them for sale. Upon investigations of the applications to purchase these particular lands, they were usually found to be timber, sometimes water power, sometimes mineral, but mostly water power and timber.

"Q. It is alleged in the Answer that 'Said Oregon and California Railroad Company has at all times openly and notoriously claimed,' and so forth, to be the owner of the lands in this suit, has at all times caused the said lands to be protected by field agents who traveled over and protected the same against depredation and waste, has at all times paid the taxes levied and assessed upon and against the said lands, and in divers other ways openly and notoriously proclaimed and asserted and has been in possession of the said lands, and that large and different portions of said lands were reduced to possession and improved from year to year by persons holding leases thereof for grazing and other purposes from the Company, and other portions of lands were reduced to possession as right of way, station ground, depot ground, and the like for railroad purposes of the Company. Now what would you say as to the facts in respect to that matter? What was done, or did you do, towards carrying out and protecting the possession of these lands during the time you had charge or control of the same?

Mr. Townsend: Objected to as incompetent, irrel-

evant and immaterial, and assuming that the lands were reduced to possession of the Oregon and California Railroad Company, which is not disclosed by the evidence.

A. The lands were absolutely owned and controlled, and so always understood to be, and we paid our money, protected it at great expense against fire and depredation, paid the taxes, an increasing burden of taxes, exercised every incident of ownership in regard to real property.

Mr. Townsend: The answer is also objected to as incompetent, irrelevant and immaterial and consisting of mere conclusions of fact and law and not a statement of facts from which the ultimate facts of possession may be deduced.

Q. State to the Court whether or not the Company while you were in charge took such possession of these lands as their nature and character permitted?

Mr. Townsend: Objected to as incompetent, irrelevant and immaterial, and calling for a mere conclusion and an opinion of the witness as to what constitutes possession, and a conclusion of the witness upon the question of fact as to what extent the lands could be reduced to possession and in no way establishing the rule as to actual possession within the meaning of the Oregon statute relating to suits to determine adverse claims to real property.

A. We took possession; we had possession, continuous possession, during my time.

Mr. Fenton: Just read the question. I don't think you got the question, Mr. Eberlein.

(Question read)

A. Yes."

Witness further testified that his official relations with the Oregon and California Railroad Company were discontinued June 1, 1908. He made an official report or statement of facts relating to the land grants of the Oregon and California Railroad Company, the successor in interest of the Oregon Central Railroad Company, East Side, and the Oregon Central Railroad Company, West Side, on or about that time. On one of those pages he gives a list of the authorities, sources of information. It is a bald statement of facts, reproduces the acts of Congress and the legislature, the correspondence of the Interior Department and other sources, reproduces the articles of incorporation of the different railroad companies, and was intended to be a full statement of all the facts bearing upon the case. The facts concerning the physical character of the grant were from all reports and from his own knowledge, the number of acres, the acreage and condition thereof, from the letters of the Commissioner of the General Land Office, reproduced in full in that compilation. The letter of Binger Herman adjusting and settling the grant is reproduced in full. This report is based upon the records of examinations of the lands in the grant by particular tracts made during all the years prior to April 18, 1901. All the information that was in the department or could be gathered was

summarized in the facts given.

"Q. Well, I notice at page 70 of this report, which I will show you presently and which I will offer for identification, a statement that the report of your field agents shows 1,496,640 acres covered with timber and unsuitable for agriculture, and 703,652 acres of grazing land unsuitable for agriculture, and 7,320 acres that might be used for agricultural purposes at the present time but which acreage consists of small isolated tracts, many of them remote from transportation and settlements and scattered in small bodies in different places throughout the whole extent of the grant along creek bottoms and on hill sides. Now from what sources of information outside of your personal knowledge did you obtain that information?

Mr. Townsend: That is objected to as incompetent, irrelevant and immaterial, and being an attempt to introduce in the record this self-serving statement of the witness while an officer of the defendant and obviously made after the passage of the Act of April 30, 1908, as a part of the preparation of the defense in this case.

Mr. Fenton: No; it was made May 1st, 1908.

Mr. Townsend: Well, the Act was passed April 30th, and had been pending six months before and Mr. Eberlein was there. I know; I saw him myself.

Mr. Fenton: You don't think he made it that night?

Mr. Townsend: No; I think he made it anticipating that the act would go through.

A. From the field force of the department, men employed who had long familiarity with the grant having reported on the grant for a great many years.

Mr. Townsend: The answer is also objected to upon the ground that it now appears that the statement was made upon hearsay of others.

Q. Were these reports reports of your employes?

A. Yes sir.

Q. And were the reports made in the usual and ordinary course of business by your men in the field, thus employed, on which you relied as an official of the company?

A. Yes, sir.

Q. And did you act upon them as correct?

A. I did.

Q. I notice on page 69 of this official report of yours of May 1st, 1908, statement of lands in various counties, embracing Oregon and California Railroad Company land grant assessed for taxation as shown by record of county assessors for year 1906, and showing assessors' classification of Oregon and California Railroad Company lands as tillable and non-tillable. From what sources was that table prepared?

A. From the official statement of the officers of the various counties. I think the sheriffs make those statements in this state, do they not?

Q. The Assessor.

A. The Assessor?

Q. Yes.

A. Anyhow, the official whose business it was; in his official statement. I think they are on file in the department still.

Q. I notice in this statement that the acreage of patented unsold lands of Oregon and California Railroad Company assessed as tillable is only fifteen acres and the balance all assessed as non-tillable?

A. That is the fact.

Q. For that year?

A. For that year.

Q. That was 1906?

A. That is the assessment of 1906.

Q. That was about two years before the resolution of April 30th, 1908?

A. Yes sir.

Q. Now I notice a map attached to this report of yours of reduced size. What do you have to say about the accuracy of that map, if you know?

A. Well, the map was made up under my order and shows the amount of land that was excepted from the grant by process of law.

Q. What it purports to show is a correct delineation of the grant?

A. Of the grant and the character as to certain

things.

Q. Now to whom were these reports submitted?

A. To the different officers of the company, primarily to Judge Cornish. I left for Europe immediately, severed my connection entirely with the road, and that was the last work of any magnitude I did for the Company, and I think copies of it were sent to different—

Q. (Interrupting) To the officers of the Oregon and California Railroad Company?

A. Yes, sir, I think so; to the attorneys.

Q. What have you to say as to the correctness of that report in the statement of ultimate facts based upon your knowledge and the knowledge of the records upon which it is based?

Mr. Townsend: That is objected to as incompetent, irrelevant and immaterial and a mere conclusion of both law and fact, and necessarily hearsay.

A. The report as it stands is all but a very small part official records, as to which there can be no question.

Q. As to the balance?

A. As to the balance it is simply bald statement of actual facts and figures; there can be no other deduction —there are no deductions in that report; it is simply a statement of actual figures and facts.

Q. Well, such of the facts as are stated and such of the figures here as relate to the acreage of grant, and such matters as that, upon what are they based?

A. They are based upon the actual books of the Company and they are corroborated by the official statement and settlement of the grant by the Honorable Binger Herman officially, and his letter, his official communication is reproduced in full in that.

Q. As to the sales and matters of that kind that would appear in the records of the Company and as to the reports of cruisers and things of that kind upon which you base the acreage of timber and of grazing and of non-agricultural lands, as I understand that is based upon the official reports made to you by these cruisers and others?

A. That is true.

Q. Do you recognize this document which I now hand you as your official report made May 1st, 1908, as identified, and about which you have been testifying?

A. This is one of the copies, one of the duplicates or triplicates, or quadruplicate copies; I don't know; and it is exactly the same as the original, excepting my signature which appears to be omitted from this copy.

Q. It is a typewritten duplicate of the original which you signed, and is an original in itself, excepting that your signature is not on it?

A. Yes, sir.

Mr. Townsend: That is objected to as calling for a conclusion of the witness on a question of law and evidence.

Witness: That is my copy that has been in my possession ever since it was made."

Whereupon defendants offered in evidence said report prepared by the witness and marked Defendants' Exhibit 309, to which counsel for complainant objected as incompetent, irrelevant and immaterial, based upon hearsay, and a mere statement of conclusions of fact and law, and is a self-serving declaration, prepared by one of the officers of the company for the purpose of this defense and that there is no evidence accounting for the loss of the original documents upon which the statement is based. Whereupon the same was received in evidence and was marked Defandants' Exhibit 309 and is hereinafter set out and described and made a part of this statement of the evidence and identified herein as such. Whereupon the witness further testified, referring to the number of outstanding contracts, in giving the name of the grantee or vendee, that the names of the vendees were practically unknown the morning after the fire, and it was very difficult and a long drawn out operation to ascertain the addresses and names of the vendees of a number of these sales. He took a man to New York in May, 1906, and put him to work in the office of the Union Trust Company making abstracts of all data that the Union Trust Company had regarding sales and collections from 1887, the date of their mortgage down. He went further than that and made arrangements with the officers of the Farmers Loan and Trust Company, which was the trustee under former instruments, and got what information it had, and he scraped New York

clean so far as he could find anything that was there and he discovered a great deal of information in that way. Whereupon the witness upon cross-examination further testified that he has none of the files of the Oregon and California Railroad Company relating to these land grants,—nothing relating to the Oregon and California Railroad grants. He has this statement of his and if there is anything that he has, of course he will go through it and let counsel for the Government have it. He formerly lived at St. Paul in Minnesota and became acquainted with and knew Judge Cornish a great many years. Judge Cornish was appointed by Judge Sanborn as Master in Chancery in the receivership proceedings involving the Union Pacific Railroad about 1893, and that receivership continued about five years until about 1898, and in the discharge of his duties Judge Cornish naturally became familiar with Union Pacific affairs. Cornish became vice president on the reorganization of the Union Pacific by Mr. E. H. Harriman and served in that capacity until his death. Witness resided at St. Paul about 15 years, until about July 1, 1901, when he entered some form of employment in connection with the Harriman lines. His original employment was assisting the Vice President in regard to land affairs of the Union Pacific. His first employment was to assist Judge Cornish in connection with the administration of the land department of the Union Pacific, and that was his first official connection with railroad land grants. He had more or less to do with the lands of the old St. Paul and Sioux City grant in the matter of handling them as

the trust officer of the old St. Paul Trust Company. When he first became associated with Judge Cornish his official residence was at St. Paul. He was then employed on some special work by Cornish in connection with the Union Pacific land grants. He had several different employments practically at the same time, but it had to do with lands largely, referring to his employment beginning July 1, 1901, which included the Union Pacific land grants. Most of his work was done there outside of just digressions when he would be sent out to make special reports or something else, like the irrigation possibilities of the Snake River Valley. He made a long examination and report on that in the winter of 1901 and 1902, but returned to the land grant business. Judge Cornish was then stationed at New York City, but rarely visited St. Paul after 1901, he was there occasionally but not very often. He had conferences with him almost always at New York. Sometimes he met him on his way west, or when he came to Omaha, but that was very rarely. He left St. Paul when he went to the Union Pacific employment. On July 1, 1901, he went to Omaha. He was confidential adviser of Judge Cornish and the New York office and his work there in a general way was the same as his subsequent work in the west. That is, to make recommendations as to the reorganization of the land department and the reformation of some of the methods of handling its business, and that was the general character of his work at Omaha, making reports and recommendations. He remained at Omaha from July 1st, 1901, until some time in 1902, when he

first came to the Coast. But this trip was one for the purpose of general observation, and he returned to Omaha after that trip. He returned to New York, but didn't have much to do. He was detailed on his return from that trip to Omaha to take up and examine into the affairs of the Union Pacific Coal Company, and barely got started on that work when he was sent for, to be consulted about coming out here. That was some time in 1902. He had practically finished the work he was sent there to do with the Union Pacific land grant. It was sometime in 1901, or 1902 that the ownership and control of the Southern Pacific was acquired by the group of financiers known as the Harriman System, and the same group became interested in the affairs of the Oregon and California Railroad Company, and Mr. Harriman became president of the Oregon and California Railroad Company. Harriman became president of some of the constituent lines of the so-called Southern Pacific System, but he does not know as to all; he was president of the Southern Pacific Railroad Company, he does not know as to the Central Pacific, but understands that he became president of the Oregon and California Railroad Company. Judge Cornish was never an officer of the Oregon and California Railroad Company to his knowledge, but Judge Cornish gave attention to the work which witness was doing and witness reported to him. Whether Judge Cornish had official connection or not with all of the land grants constituting the so-called Harriman lines, he does not know or remember as to some of them, but as to having immediate supervision and being the

man between witness and Harriman and to whom the reports went and someone to whom he reported in New York on these special missions and which he was sent out to fulfill, Judge Cornish was that man. That included work with reference to the Union Pacific grant, the Kansas Pacific grant, the Denver Pacific grant, the Central Pacific grant, the Southern Pacific Railroad grant, and California and Oregon grant and Oregon and California grants; and he may say the grants in Texas. But there is a distinction to be made as to the Union Pacific proper land grant, Union Pacific Railroad land grant, Kansas Pacific grant, and Denver Pacific. In that case Judge Cornish was the vice-president of the Union Pacific Railroad, in direct charge officially. He was president of the Union Pacific Land Company, which took over and held title and managed and disposed of all of the lands of the Kansas Pacific and Denver Pacific grants. In these other cases, he was not officially connected with the subordinate companies, to his knowledge. But waiving the question of his official authority, Judge Cornish actually supervised the work of all the grants in substantially the same manner. Supervision is the right word, because he did not exercise the same authority by any means over these grants here on the Pacific Coast that he did over the Union Pacific grants. Judge Cornish did control the actions of witness upon questions of policy, and did give witness instructions on the Union Pacific, but he never thought he had the same amount of authority on these grants on the

Coast, including the land grants involved in this suit and he, Cornish, never exercised it. Judge Cornish always waited to hear what Mr. Harriman had to say about it. So really Mr. Harriman was the man who directed it. That accounts for long delays that were suffered here in the rehabilitation and other things, because there was no one who would act offhand as they did on the Union Pacific. Judge Cornish acted as a sort of go-between for witness and Mr. Harriman. There was no practical purpose served in this roundabout way of getting his recommendations to Mr. Harriman. It was an unfortunate occurrence, that was all. He does not mean to be understood that Judge Cornish did not exercise any authority at all, but he does say that Judge Cornish did not have and did not attempt to exercise, the same authority on these grants on the Pacific Coast that he did on the other grants, for the reason of lack of official connection. It seemed to witness that almost any specific question that he presented to Judge Cornish in connection with the Oregon and California Railroad grant as to which he deferred action until Judge Cornish consulted with Mr. Harriman, was about everything that amounted to anything of any importance; that Judge Cornish was a great fellow to sidestep things; in this connection it may be well to say that Mr. Kruttschnitt exercised or assumed to exercise about as much authority over these land affairs as Judge Cornish did, and it was the practice of witness,—he was very often at a loss to know how to proceed and he made reports, as will be found, to Mr. Kruttschnitt at the same time that he made

them to Judge Cornish,—and between the two stools he generally fell down between them and affairs were hung up here for that reason. Now as to particular instances of this, he does not call to mind any particular one at present. There was a reason why Judge Cornish should not sidestep as to the Union Pacific grant the same as he did with reference to the grants in question. Judge Cornish was the vice president and by direction of the board in charge of land affairs of the Union Pacifc Railroad Company, and was also the president of the Union Pacific Land Company. He was the man that was vested with absolute and final authority in those matters and he acted promptly in those cases; so much so that in a little over a year's time they thoroughly reorganized these grants and put them on the market, and in three years' time they were practically sold out, referring to the Union Pacific grant. On these grants in question the trouble was, from the very start, to get authority for anything. If there was anything that looked as though anybody had to have authority, why, it would go to Judge Cornish and he would discus it with Mr. Kruttschnitt and the latter would pass it back and then sometimes they would jointly go to Mr. Harriman and have a talk. Harriman was president of the Union Pacific at the time Judge Cornish was appointed to this office. He does not think that Mr. Harriman disturbed himself very much about the Oregon and California grant, that he ever heard of; that is, not to his knowledge. Harriman really depended upon somebody to look after these affairs for him, but the fact remains that they did not act

on that but felt as though these matters on the Pacifc Coast were large and complicated, and they wanted some more direct authority, as he supposes. Judge Cornish had no authority from any board of directors that he ever heard of; and the only authority Judge Cornish had was by letter from Mr. Harriman. Witness got his authority from Judge Cornish, who had authority enough to give him authority. Everything witness did in connection with these grants on the Pacific Coast was under the authority of Judge Cornish, except what Mr. Harriman gave himself. Practically he was just as much under the supervision of Judge Cornish after he was formally appointed acting land agent as he was before; at least he assumed that he was. That is, in the actual practical carrying out of his work, he consulted with Judge Cornish just the same after his appointment on October 1, 1904, as he did before, but he also consulted with Mr. Kruttschnitt and others. There was a divided control out here all the time. His appointment as acting land agent made no change in that respect. He came from New York and reported back to New York right along. In connection with his work, that is the result of his work relating to these several land grants, he observed a general policy that was pursued by Mr. Harriman and Judge Cornish with reference to the administration of these land grants. They attempted to consolidate and standardize all their activities, and they also attempted to administer the land grants with reference to one another to serve the common interests of the constituent companies and also of the parent companies, and it never got

beyond the stage of reorganization with him. Ties were bought here in Oregon, not only for the lines in Oregon, but for other Southern Pacific lines, and Union Pacific lines. The reservation of 100,000 acres of timber lands never got so far as to serve all of the constituent lines of the Harriman lines, so far as he knew. The intention as to that reservation was, so far as he was concerned, simply with the road which he was interested in. But he assumes of course that those timbers and ties cut from that land might be used and probably would be used by other lines and paid for by them. He does not know how many ties could be cut from the 100,000 acres that were reserved, nor how many miles of railroad it would supply with ties and bridge timbers, but generally speaking, if properly administered and reforested, it would supply a large one. Whether the entire Harriman System he would not say, because the entire Harriman System would not come here for ties. They would not want to come here for ties, because the freight would eat them up. That 100,000 acres of timber lands there, would supply the lines on this coast, he presumes; though of that he does not claim to be qualified to speak. The number of acres that should be reserved was, he thinks, determined in conference with Mr. Kruttschnitt, who was the general manager and vice president of the Southern Pacific Company, and he thinks on the board of all of the original companies on this coast. He knows he was a director, probably an officer, of the Southern Pacific Railroad Company, and believes he was a director and probably an officer of the Oregon and California Rail-

road Company and was vice president of the Southern Pacific Company; but he thinks he was not an officer of the Union Pacific, or the Oregon Railroad and Navigation Company, or the Short Line. He thinks that the quantity of timber lands that should be reserved was determined in that conference with Kruttschnitt. He does not think Judge Cornish passed upon them, because that was something outside of his knowledge. Cornish would necessarily have to depend upon recommendation. As to the fact of the advisability of making the reservation and setting aside the lands he does not think that Judge Cornish would attempt to pass on the question. He does not think that he knew anything about it.

"Q. Now, Mr. Eberlein, it was one of the policies of Judge Cornish and yourself and, I may say, Mr. Harriman and the other officers of any of these companies who assumed or exercised any authority with reference to the subject, that the land grants should be administered with a view to promoting the general financial interests of these companies; isn't that true?

A. Well, if you mean by the general financial interests the managing of them in a careful, conservative, economical way in which they would produce the greatest results, both in money and in other ways for the roads, yes.

Q. That is what I mean; that the administration of these land grants was conducted along lines of policy that included other questions than the mere money that might be derived from the sale of the lands?

A. Well, that was always my idea.

Q. And you got that idea as the result of your connection, consultation and work with the other officers that you have mentioned, as well as your own initiative?

A. My own study of the case.

Q. And you found that that general view was shared by the others with whom you came in contact, including your superiors?

A. I believe so.

Q. Now when you came to Oregon or to the Pacific Coast in 1903 and entered upon the work of straightening out the affairs of the land grants involved in this case as well as the other land grants upon the Coast, you made your office where? Your headquarters, I mean.

A. The headquarters were San Francisco.

Q. You had offices elsewhere where your work was carried on, but your personal headquarters were San Francisco, were they?

A. Yes. I kept an office in New York and was called there frequently, but I was in San Francisco most of the time. But it must be understood that I didn't come here to run any land grants.

Q. I said to straighten out the affairs.

A. Just the matter of reorganization, the examination and reporting. The other was an afterthought and was to be temporary. That was the agreement with me,

that I would not be required to administer details only for a short time to relieve a difficulty.

Q. You came here with the understanding that your work here should involve substantially the same scope as it had on the Union Pacific?

A. Yes, sir.

Q. Straighten out the affairs of these land departments and put them upon a more economical and more practical basis and start it along the lines of the new policies and then that you would be succeeded by some one else?

A. Yes, sir; relieved.

Q. Now, Mr. Eberlein, you know as a practical fact, do you not, that the Southern Pacific Company virtually controls transportations affairs, speaking in the broad sense now, in western Oregon west of the Cascades and particularly from say Albany to the southern boundary line of the state?

A. I believe it is the only rail line between those points.

Q. There are some small—

A. (Interrupting) I mean through.

Q. (Continued) —transportation facilities in addition to that, but in a general way the Southern Pacific lines constitute substantially all of the available means of transportation of the products of the State of Oregon west of the Cascade Mountains and particularly south of Albany?

A. Yes.

Q. And that was true during all of the time of your work out here?

A. Yes, sir."

Whereupon defendants objected to this character of testimony as immaterial, incompetent, and irrelevant and it is stipulated between counsel that this objection may go and is understood as reserved to all this class of testimony.

Whereupon the witness further testified as follows:

"Q. Now, Mr. Eberlein, Mr. Harriman was really the dominant factor in all of these companies, was he not?

A. In everything he had anything to do with I think he was the dominant spirit.

Q. That was owing not only to his peculiar and wonderful genius in affairs of this kind, but also to the natural disposition of the man?

A. Yes, sir.

Q. And it is entirely correct to say that after the Union Pacific acquired the controlling interest in the Southern Pacific lines that you have mentioned that the affairs of all of these constituent companies were conducted with reference to the will of Mr. Harriman in so far as he exercised it?

A. That is generally true, I believe.

Q. Now reverting again to the fact that the Southern Pacific Company, as the operating company of these

constituent lines, including the Oregon and California Railroad, controlled virtually all of the transportation facilities in western Oregon in the district that I have indicated in a previous question, it is also a fact, is it not, Mr. Eberlein, that at the time you entered upon your work in connection with these land grants and even to the present day the Oregon and California Railroad Company, subject to the rights asserted by the Government in this suit, owned and still owns between one-third and one-half of all of the lands tributary to the line of its railroad here in Oregon? I refer now to the main line extending from Portland south through Salem, Albany, Eugene, Roseburg, Medford, from say Eugene southerly to the southern boundary line of the state and by tributary to its line of railroad I mean within the limits of its land grant, both primary and indemnity, as exemplified on the maps that have been introduced in evidence here?

A. I should judge that the statement of about one-third within the limits fixed by you would be—

Q. (Interrupting) Substantially correct?

A. About correct as between the exterior boundaries of the grant. However, I never understood that the ownership was subject to any claim of the United States,—not while I had anything to do with it.

Q. I say, subject to the rights asserted in this suit?

A. Well, that I could not pass upon. I am speaking of the thing I always understood and so held it to be in absolute ownership in the railroad.

Q. I understand that.

A. Yes.

Q. But you do not deny—

A. (Interrupting) That there is a suit.

Q. That the ownership is subject to any rights that the United States may have, without conceding that they have any?

A. Without conceding they have any, certainly.

Q. But you do not deny they are subject to any rights the United States may have, though?

A. If the United States can prove any rights, yes.

Q. So that in the discharge of your duties in connection with this land grant in Oregon you found the Southern Pacific in control of the transportation in western Oregon and particularly southerly from Eugene, and also in control through its stock ownership of the Oregon and California Railroad Company of virtually one-third of the lands tributary to that line of railroad?

A. Within the limits of the grant?

Q. Yes.

A. I won't say outside of that, because there may be a large body of land outside to the west that would be tributary and perhaps is tributary, that I would not know enough about to testify to.

Q. Well, as I explained before, by tributary to the line, I mean within the limits of the grant?

A. Yes; yes. Very well.

Q. Now in your work in connection with this grant and in devising the plans for the reorganization of the land department and the adoption of new policies for the handling or use of these lands, did it ever occur to you that the lands controlled to a certain extent the subject of transportation in future years?

A. Why, I don't know that I thought of it in exactly that angle. The matter had a great deal of thought on my part, all that I could give to it. The principal thing in my mind was the divesting of the Railroad Company of this large body of lands. I didn't think that it was to the best interests of the road that it should retain these lands. It was a burden.

Q. It was your opinion that the best policy was to pass these lands on into independent proprietorships?

A. Yes, sir.

Q. To become an instrument of production to aid in transportation?

A. Population and industry. That was the whole idea. There was no advantage to this line of road, or any line of road, to have a contiguous land grant without settlers, without people on it.

Q. Well, if a line of railroad has virtual control of the subject of transportation in a given community and owns virtually one-third or more of the lands tributary to the line of road, and by that I mean as I have explained before within thirty or forty miles of the railroad, and specifically speaking within the limits of this land

grant, it also controls to a very marked extent the production of the territory tributary to that line of railroad, does it not?

A. Not necessarily.

Q. Well, it can control it?

A. It might; if it wished to pursue a suicidal policy it might do so. But I don't understand that that has ever been the policy of the Southern Pacific.

Q. But you realize, do you not, the difficulties that a competing line of railroad would encounter if it attempted to invade a field where its competitor owned one-third of the lands tributary to the line?

A. It might be, as you say, something that a competitor would have to consider. On the other hand, it would be unfair to the line of road, the pioneer, that its property should be used to induce a competitor.

Q. In other words, you feel that it would be unfair for the pioneer road, as you describe it—and by that you mean the Oregon and California Railroad in this case?

A. Yes, sir.

Q. To so dispose of its lands that it might attract a competing line of railroad?

A. Yes, sir; that is my idea.

Q. And that was your idea during the time that you were engaged in the work in connection with these land grants that you have described?

A. Yes, sir.

Q. Now what plan or policy, if any, did you discuss or attempt to evolve or devise that would secure to the Southern Pacific Company and its constituent company, the Oregon and California Railroad Company, the benefits of the transportation of the products of this land included in this land grant?

A. My plan, which was simply a recommendation, originated with me, never had any active recognition that I know of from the general officers of the road, was that that land grant should be sold out reserving only so much of it as was necessary to the operation and to the traffic of the road, in exactly the manner testified to by me yesterday. That would mean simply reservation for stations and rights of way for various purposes, stock yards for traffic, and land that had water for engine supply, gravel banks, and things of that kind, which were of more value to the road than to anybody else and which the road would have to acquire from some one else if it disposed of them; and after those reservations had been made, to sell that grant in such a manner as to produce the best business results for the Railroad Company and by doing so it would produce the very best results for the community. And my idea was, and I believe it is correct economically, the land belongs to the road; they paid for it by the construction of the road, earned it. If it owns the land it owns the product of the land, as the timber, I recommended the land should be sold at a very reasonable price to responsible people who would within a reasonable time develop, that is by the establishment of mills, develop the product, and when so developed that

all the Railroad Company reserved would be the right when so developed to carry the product, the lumber product, at the rates then current as to which any other line would carry the product; otherwise, to have the right of the shipment and the routing of the product of the land.

Q. So that your plan was to sell the lands by such a method and upon such terms to be inserted in the conveyance as to create covenants running with the land that would guarantee to the railroad the transportation of the product of the land?

A. Exactly, subject only to such further reservation as would protect the shipper; and that is, he would not have to pay any more for the transport of that over the Southern Pacific lines and its connections than he would over any other competing line at the time of shipment.

Q. Well, do you honestly think if all of the lands marked in black upon any one of those maps were passed into private proprietorships under conditions which required that the product of those lands should be shipped over the Southern Pacific line, that there would ever be any competing line?

A. Certainly.

Q. You think there would be?

A. Certainly. It is the history of all railroads that where you have an industrial community growing, that a single line will not carry the product, and that the very fact Congress of the United States established that grant in the form that it established it as well as every other

land grant established by Congress—and I have reorganized several now—in the way it did, to prevent a monopoly, and it does prevent a monopoly. There is one-half of all the land that is in there—yes; there is more than that; there is the entire body of the Willamette Valley, as you will see from those maps.

Q. I refer now southerly from Eugene.

A. Well, take it southerly from Eugene; you have got the Umpqua Valley, the entire body of that valley is in private ownership and has been since before the time this road was established, and it is open to any competing line who will come in; and it must be remembered that a competing line has actually paralleled that line that you have reference to east of the mountains, throwing feeders across the mountains into the Rogue River Valley, for instance. There is not anything to prevent another line, notwithstanding that land grant. The Southern Pacific, according to my view of the case, was simply holding what belonged to it of right, and it should have.

Q. Do you mean to say that, referring now to Defendant's Exhibit 259 and pointing to the City of Eugene, if the Southern Pacific Company had the right guaranteed by covenants running with the land, to transport the product of all of the railroad lands appearing upon this map from Eugene southerly to the state line, that it would have no advantage over a competing transportation line that would attempt to enter that field?

A. Certainly.

Q. It would have?

A. It would. But you must remember that the timbered land in your district you have just indicated has been culled over and the best of it has gone into ownership other than the Oregon and California. They are there; you can see them on that map.

Q. They are not indicated on that map. Here is the map they are indicated upon. Now if you will eaxmine it you will find but a very small proportion of it has passed into other ownership.

A. As I say, it is the best part of it.

Mr. Fenton: About four hundred thousand acres, Mr. Townsend.

A. You go down into the sugar pine belt and you will find that the heart of that was disposed of. The best of the timber of that grant was, as I say, culled, and has been since 1898, and the culling process was simply stopped when the lands were, or the business of the grant was suspended necessarily.

Q. But you considered it substantial enough to recommend it, didn't you?

A. Certainly.

Q. And your recommendation was considered and entertained by Judge Cornish, was it not?

A. I don't know whether by Judge Cornish, it was by others.

Q. Did they ever go so far as to consider the form

of deeds that should be executed that would contain covenants of the character I have described?

A. I believe that Judge Singer drew a clause; whether in form of deed, I don't know that it ever got that far.

Q. Do you know of any instance in the industrial history of this country, or any other country, when a transportation line had a legal right to the transportation, exclusive legal right to the transportation of the products of virtually one-third of the land tributary to the line?

A. Well now, south of Eugene?

Q. No; I am referring to any railroad, now, for any district.

A. I am not familiar enough with the transportation history of the world to know. You could find such examples in Europe, I have no doubt, but all I am interested in was what was for the best interests of this strip of country and what it needs is industries. It is of no advantage to this state, or certainly not to the road, the condition in which I found this grant.

Q. It is not yet, is it?

A. That is not the fault of the road.

Q. It doesn't make any difference—

A. It is the fault of the United States.

Q. It doesn't make any difference, the fact is that the present condition is detrimental to the commercial

and industrial interests of this state, is it not?

A. Certainly, by reason of the suit of the United States which prevents any sale or disposition, that has prevented men from even milling the timber that they own.

Q. Who?

A. The men who have bought timber from the Railroad.

Q. Well, who has been prevented from cutting it?

A. Anybody.

Q. Well, name one.

A. Anyone who has bought that timber, until the passage of this act which galvanizes their title; they were not safe in cutting any timber that was on land bought from the Railroad Company.

Q. I am not talking about whether it was safe, or not. Tell me one company that quit?

A. I don't know that they quit, but they must have cut under—unless they had some agreement with the United States they were not safe.

Q. Well, did the suit of the United States in any way interrupt the operation of a single industrial plant in Oregon?

A. I believe it has.

Q. What one?

A. I can't name them, but the impression that I gained from being in this state is that it has. From the

talk that I have had with the timber men themselves I believe it has.

Q. What timber men have you talked with who expressed that?

A. Oh, I have talked with Mr. Hammond; I have talked with Mr. Blodgett; I have talked with a number of them at different times; and the consensus of opinion of those who were milling was that they didn't know where they were.

Q. Well, did any of them say that they had arrested for a moment the turning of a single wheel?

A. No, I don't suppose they did, because they were in a position where they had to go ahead in order to keep their plants open.

Q. Well, how did the suit in any way interfere with the operation of existing industrial plants?

A. Simply by clouding titles and making it a very dangerous performance for any man to proceed.

Q. Well, however dangerous it might have been they did proceed, didn't they?

A. I can't say as to whether they did or not. My impression is they did not run to their full capacity in the way they were before.

Q. Well now, where did you get that impression?

A. My impression gathered from my familiarity with conditions in this state, living in the state as I do most of the time and in the southern part of it which is a timber country.

Q. Well, can you tell me one mill that has reduced its products because of the pendency of this litigation?

A. Now I am not familiar with the inside operations of these milling companies. I am testifying generally to the general expressed opinion, the fact that the lumber industry, whether entirely due to that cause or not, has suffered prostration in that lower part of the state. Whether that extends all over I do not know.

Q. Well, you know, don't you, that the Southern Pacific Company tried to nearly double the cost of transportation on timber from that part of the state to San Francisco?

A. I am not familiar with that fact.

Q. They tried to raise it from $3.20 a ton to over $5.00 a ton, didn't they?

A. Well, that is information to me. I didn't know it.

I don't know it. It may be the fact, but I don't know it.

Q. Now have you ever considered the question whether the milling industry in Oregon, and particularly western Oregon, has been in any way stifled by the service and rates of transportation put in force by the Railroad Company?

A. That might be.

Q. I say you have never studied that?

A. That was never a part of my business to study that.

Q. Mr. Eberlein, this proposition or suggestion, however you may describe it, of selling the lands upon such terms as to guarantee to the Railroad Company the transportation of the product of the lands, was under discussion and consideration at about what time?

A. I think that suggestion was made by me about 1904. Anyhow, it was when I was actively at work making a report on the conditions here as I found them.

Q. It was after your appointment as acting land agent?

A. I think before.

Q. And how long was it under discussion and consideration?

A. I don't know as to that. It cropped up again. I renewed that recommendation as late as 1906.

Q. Now your testimony upon direct examination indicates the fact to be, and I therefore ask you if it is not a fact, that when in the fall of 1904 you contemplated the resumption of the sale of the lands, and which purpose was abandoned as you have described because of the objections urged by Mr. Cotton, and when you again formed the purpose in 1906 of resuming the sale of lands, which purpose was again interrupted as you have described by the loss of your records in the San Francisco fire—

A. (Interrupting) That is, as to the sale of timber lands only.

Q. Yes, but what I am getting at is that at those

times you intended to put on sale only the agricultural lands, did you not?

A. That is all that it was possible to put on at that time.

Q. It was not intended to put on sale any of the timber lands?

A. Just as fast as it could be cruised and we were justified by information in making the sale.

Q. Well now, you don't mean that they were to have been put on sale until the question of the manner of selling them and whether this condition that you have referred to should be imposed upon sales, had been determined, do you?

A. No. It was not in my province; I wasn't an operating official nor a high official of any kind. That was largely a traffic matter, beyond my province entirely, and I merely made that suggestion. It was for others to act upon it. But I will say that I never had any orders to incorporate that suggestion. I believed in it thoroughly myself and I renewed it, I remember, in 1906.

Q. What I mean is this: That when the time would have finally arrived when you would recommend that the sale of timber lands be resumed, you would have renewed the same recommendation, wouldn't you.

A. I did. I will say that. I did.

Q. And the question was never definitely decided, so far as you know, was it?

A. It never was during my time.

Q. Now you say that in 1906 if a party would have applied to purchase agricultural lands you would have entertained the application and sent out a person to examine the lands and fix a price?

A. I did just that.

Q. Why couldn't you send out a person to examine any particular timber lands that were applied for and examine them?

A. I did, just that,

Q. Did you make any sales?

A. No, sir.

Q. Why not?

A. Because they would not take them.

Q. At the price you fixed?

A. I suppose so. I refer now to the application of the Weyerhauser Timber Company.

Q. But to no other?

A. I don't recall any other, because we did cruise some timber which we sold to the Southern Pacific Company, but that was under the necessities created by the fire; and as to others, I was in the East largely in 1907, I think pretty nearly the whole year, so that what was done here was done during my absence and I can't say, only that I know that cruising went on.

Q. Well now, when the Weyerhauser people applied to purchase this large body of timber land you had

it cruised and fixed a price?

A. Yes, sir.

Q. Well, when the Booth-Kelly Company applied to purchase some timber lands in 1906 why didn't you have that cruised and fix the price?

A. I don't recollect the specific application of Booth-Kelly Lumber Company in 1906.

Q. Well, I understood you to say that they applied to purchase land from you in 1906, and because they could not purchase it that they started this entire agitation?

A. I think they did.

Q. Well, what land did they apply to purchase?

A. Probably that that lay contiguous to their purchases down there. I can't give you the facts because I have no papers before me.

Q. Well, did they apply to purchase any?

A. I think they did.

Q. Well, why didn't you have it examined and give them a price?

A. Possibly did.

Q. Well now, please do not deal in possibilities. If you have no recollection please say so.

A. I can say I have no recollection of particular facts.

Q. Well, have you any recollection of having had the lands cruised that they wanted to purchase, and sub-

mitting to them a price?

A. No, I have not.

Q. But you do recollect very clearly having done so with reference to the application of the Weyerhauser Company?

A. Certainly.

Q. Now with reference to the purpose of resuming the sale of these lands after clearing the records, in the first place, and then renewing the records after the San Francisco fire, you of course can only speak for yourself; isn't that true, Mr. Eberlein?

A. Yes.

Q. That is as to what the real purpose of Mr. Harriman was, or his intent, or that of Mr. Cornish, you cannot assume to speak?

A. I don't assume to speak for anyone but myself.

Q. Do you remember when Mr. Harriman visited Oregon and California and the Pacific Coast generally, in September, 1907?

A. September, 1907? I didn't know—I don't remember of his being here at that time.

Q. Do you remember that he was here in September, 1907, at Portland, and went south to San Francisco and Sacramento and addressed a conservation congress at Sacramento in the early part of September, 1907?

A. I may have known it at the time, but I have no

recollection now.

Q. Do you remember that Mr. Harriman, on September 2nd, 1907, at Portland, gave out an interview, which was published in the Evening Telegram of Portland, Oregon?

A. I don't remember of any such article.

Q. (Interrupting) Wait a minute; let me finish the question. In which he stated that it was his policy to put on sale the agricultural lands but that the timber lands should be reserved by the Railroad Company? Do you recollect it?

A. No, I don't recollect it; nor do I believe that he ever said it.

Q. Do you recollect that at Sacramneto in his speech there he stated that the timber lands in Oregon would not be sold but would be reserved by the Railroad Company?

Mr. Fenton: The same objection. What date, Mr. Townsend?

Mr. Townsend: That was in the fore part of September, 1907.

Mr. Fenton: At Sacramento?

Witness: Now, let me just qualify my testimony that has gone before. I do recollect now that you call it to mind, of being at Sacramento and of being one night at, I believe it was the Irrigation Congress.

Q. It might have been the Irrigation Congress in-

stead of a conservation congress.

A. I think it was an irrigation congress, and I was there and I met Mr. Harriman there, and I don't recall at this time having heard any such remark made by him.

Q. Well, did you hear his speech before the congress?

A. I think I did. He was there for that purpose that night. He would not be there for any other purpose. The record of the congress, though, will be conclusive on that, of course. Let me suggest something to you. The record of the proceedings of the National Irrigation Congress of that date are to be had. I believe they can be found in the city.

Q. Do you know where we could get a copy without too much delay?

A. Any of these libraries.

Mr. Fenton: Would that contain the speech?

A. It contains verbatim reports of all speeches and all proceedings.

Mr. Fenton: Would it contain Mr. Harriman's speech that night?

A. If he made that speech it was reported. I was an officer of the Congress one time when it was here in Portland, and I know that all speeches, all proceedings are reported verbatim.

Q. Well, you have no reason to doubt the accuracy of the Associated Press records of that subject, have you?

A. Why certainly.

Q. What is it?

A. Why, of course.

Q. Now, is it not a fact, Mr. Eberlein, that in 1906 and 1907 it was your purpose to resume the sale of agricultural lands only but not timber lands at that time?

A. Now, so far as I controlled it myself, and speak for myself, it was my desire and my recommendation; whatever was the determination of my superiors I can't speak for, but my recommendation was to resume the sales of timber as fast as they could.

Q. I direct your attention to Defendants' Exhibit 277, consisting of two telegrams addressed to you by W. D. Cornish, the first bearing date New York, April 5, 1907, and the second bearing date New York, April 24, 1907, and ask you to read those, please, not aloud but for your own information.

A. Yes, sir.

Q. You observe that in his first telegram Judge Cornish said as follows: "Please mail me report at convenience showing progress made in rehabilitating your office and also what extent you are receiving and handling applications for lands and especially lands other than timber and mineral." You observed that language, did you?

A. Yes, sir.

Q. Well now, is it not a fact that at that time, without referring now to your own individual judgment as

to what should be done, that it was the purpose and intent of Judge Cornish as expressed to you, not to resume the sale of timber and mineral lands?

A. That is not what that means.

Q. What is it?

A. That is not what that means. It might bear that construction from your point of view, but the fact is that the reference to timber land there had reference to the impossibility of our making any general sales at that time.

Q. What do you mean by general sales?

A. I mean throw the thing open to everybody to come in.

Q. Well, can you explain why you could not have sold any timber lands in the year 1907, if you had wanted to?

A. Because you can't do a thing piece-meal, not timber; that is, if you have any consideration at all for what you are doing. There are one or two reasons why it was not practical. In the first place, my recommendation was to cruise the grant generally and classify it and group it before resuming sales.

Q. Well, was there any reason why if a man wanted to buy a particular piece of land in a locality which had been completely cruised and classified and graded, that you could not entertain his application without waiting until the entire grant was cruised?

A. That may be, but there were no conditions of

that kind.

Q. Did you have any applications to buy timber during the year 1907?

A. I think so.

Q. Other than the Weyerhauser Company?

A. I think so.

Q. Did you sell any?

A. No, I didn't.

Q. Did you quote a price to any of the applicants to purchase?

A. I think not.

Q. Did you send anyone out to cruise the land which they applied to purchase?

A. Yes, sir.

Q. And did not quote a price?

A. I don't recollect of any prices being quoted. I recollect of sending applications with the information and everything to Cornish at New York. I didn't assume to sell, you understand. The matter was referred to him, the matter of all sales. Had he ordered the sales made they would have been made.

Q. Then the reason that they were not sold was because Judge Cornish did not authorize the sales?

A. Neither he nor anyone else.

Q. Now that is also true during the year 1908 down to the time that you severed your connection with the

road?

A. I was in New York the entire time, almost the entire time of 1907. I was here only a few weeks.

Q. How about 1908?

A. I was not here at all, except to pack up some goods, some household goods and go back to New York.

Q. You were in New York then in 1908 until May 1st?

A. Until June 1st.

Q. Until June 1st?

A. Yes.

Q. Well now, during that time were there any applications for the purchase of timber lands?

A. I think there were applications. No; I wont be sure about that. It was about that time that, after the excitement here, as you know, started, it had a very quieting effect on everybody.

Mr. Fenton: What do you mean by excitement?

A. Oh, I mean the excitement that was fomented against the Railroad Company and the land grant.

Q. Well now, without speaking with any feeling in the matter, you mean that when the question of the right of the Railroad Company to convey the lands in quantities exceeding one hundred and sixty acres and for a price exceeding two dollars and a half an acre, and to other than actual settlers, that then there were not very many people who cared to risk the title and therefore

there were few applications to purchase? Is that what you mean?

A. My recollection is just this: As to 1907, in fact, subsequent to the Weyerhauser Timber application, which was disposed of in Decemebr of that year 1906, it is my recollection and I believe I am correct that there were no applications, bona fide applications to buy. There were a number of cases where people asked that an application be filed; and I will say they went so far in, I think a number of instances, a great many, probably, to say that there was no immediate desire for it but that whenever the Company was in a position to sell, that they understood there was to be some litigation, that they wanted to be in a position to have their application recognized and considered.

Q. Now, so that the examination may not be misleading, I will state that I do not include in the scope of any of my questions at the present time the so-called applications to purchase by those who claim the right under these acts of Congress to buy at two and a half an acre.

A. No, I don't refer to that class at all. I refer to those simply making application to buy tracts of land and asking that their applications might be filed so that they be recognized in order.

Q. Now you were authorized by Judge Cornish to sell strictly agricultural lands, were you not?

A. Yes; subject to his approval in each case.

Q. But you were not authorized by him to sell timber lands?

A. None. He did not authorize, and so did Mr. Kruttschnitt authorize the cruising of the Weyerhauser timber.

Q. But that was an exception that was made, wasn't it, Mr. Eberlein, and over your protest?

A. Well, it would appear so.

Q. And really against your advice, wasn't it?

A. Against my advice.

Q. Your advice was not to entertain that application to purchase?

A. I would not.

Q. I say that was your advice?

A. That was my advice.

Q. Now with that exception you were not authorized to entertain any application to sell timber lands during the years 1906 and 1907 or 1908?

A. I think not, so far as I know.

Q. But you were authorized to entertain applications and sell agricultural lands, subject to the approval of Judge Cornish?

A. And grazing lands.

Q. And grazing lands?

A. Yes, sir.

Q. But even those had to be referred to Judge

Cornish?

A. Yes, sir, that is true.

Q. And at that very time, Mr. Eberlein, as your report shows which you made to Mr. Cornish, you believed that there was but fifteen acres of agricultural lands in this grant?

A. No, I won't say that I believed there were only fifteen acres.

Q. Well, you so reported, did you not?

A. Oh, no.

Q. Based upon the Assessors' reports?

A. I put in the table the official returns of those Assessors to show what the Assessors themselves thought.

Q. Well, did you think that the Assessors' returns were correct?

A. No, I do not think they are correct, not when they assess railroad lands ever, or railroad property.

Q. Well, did you think the Assessors' returns were correct as to what quantity of these railroad lands were agricultural in character?

A. No, sir.

Q. You thought that there were more agricultural lands?

A. There were more, and that report states the fact to be what I did think there was.

Q. You thought there were about seven thousand

acres?

A. About seven thousand acres.

Q. So that it is a fact, is it not, that during the years 1906, 1907 and 1908 until you severed your connection with the Railroad on June 1st, 1908, you were authorized only to sell agricultural and grazing lands and no timber lands?

A. That is true.

Q. And it is also a fact, is it not, as disclosed by your report, that out of the two million three hundred thousand acres involved in this suit over two million acres were considered as timber lands?

A. No, not two million acres. I think there was about a million and a half acres considered as timber and wood land. That is my recollection.

Q. Your report here states that your information from the reports of your graders and land examiners is that of the patented lands 1,496,640 acres were covered with timber and unsuitable for agriculture?

A. Yes, that is right.

Q. Were you on the Coast in September, 1907?

A. Yes, sir. I was here and left here in October, 1907, to New York, and was practically not here again during my incumbency, except about a week, leaving on the 22nd of Februaary, 1908. My work was practically finished in September, 1907, and I resigned at that time, though my resignation was not accepted until the following June.

Q. Do you remember whether you were in Oregon in September?

A. I don't think I was.

Q. You now recollect that you did see Mr. Harriman at the time that he visited the Coast during that month, but you think that it was in California that you saw him?

A. I saw him in Sacramento. I went up to Sacramento to the Irrigation Congress and was there the night that he addressed the convention.

Q. Do you recollect of learning that on September 2nd, 1907, when Mr. Harriman visited Portland, he was reported in the newspapers as having said to the reporter of the Evening Telegram, of Portland, as follows:

Mr. Fenton: We object to that as purely hearsay, of about the third degree. Go on.

Q. (Continued) "What conditions did you find in the interior?" "Sparsely settled regions. You go miles and miles before you see a face or a habitation. I traveled vast stretches and saw nothing but chipmunks. The country is undeveloped. Oregon needs more people. I passed forest reserves and timber land granted to military wagon road companies. The reserves and the military road companies control too much land. This should be remedied. The reserve policy requires changing and the military company should be made to dispose of holdings." Next question: "Then, Mr. Harriman, your contention is that Oregon cannot be properly nor speedily developed until the corporations which have

vast holdings are forced to open the country to dispose of the lands?" Answer: "Yes." Question: "And does this include the lands granted to the Southern Pacific?" Answer: "Yes, the Southern Pacific, too. But the Southern Pacific hasn't much land. You see, before we came into the Southern Pacific the Company was pressed for money and was disposing of lands and giving options to syndicates and speculators, and we didn't know how much land we had so we stopped until options expired to ascertain just what we had in land. The Southern Pacific will sell land to settlers but not to speculators. We can tell a speculator from a settler as well as anyone. The agricultural land we will sell, but the timber land we will retain because we must have ties and bridge timbers and we must retain our timber lands for future supply. The Southern Pacific has an insufficient amount of timber now, and we have had to buy large tracts looking to the future supply of ties and materials. Yes, we will sell to settlers, but speculators will get none." Do you remember of such an interview having been brought to your attention?

A. I may have read the stuff at the time; probably did, because it was in the line of my work. It made no impression. It is gospel, though.

Q. It is what?

A. It is gospel; it is good sense.

Q. What do you mean is good sense?

A. Oh, I mean to say that if he said as is reported,

with the emphasis on the "if," that the Company would not sell any more timber to speculators, he said a very wise thing and the only wise thing for this state. That is the trouble with the conditions down there now.

Q. He says he would not sell agricultural lands to speculators and would not sell timber lands to anybody, speculators or otherwise?

A. Well, I didn't understand the reading, if that is the case. It is just as well not to sell land to speculators, though. That is, as I say, what the road and the country have suffered from. You take the Weyerhauser timber interests, for one thing; they have an enormous investment in this state in timber but not to my knowledge have they ever milled a foot.

Q. And yet the Weyerhauser Company was the only company whose application the Railroad Company would entertain?

A. Oh, no.

Q. In 1906?

A. Oh, no; no, I think not.

Q. What other application was entertained?

A. Now, let's see ——

A. Now, if you want to know about that, I can tell you a little incident that only goes to show, that I made a call once with Mr. Harriman on Mrs. Potter Palmer at the Waldorf in New York; I made more than one call. That was in response to an application which

she made about in 1907, and she was very insistent upon it. I had that land cruised.

Q. How much land was it?

A. Oh, several thousand acres; I forget how much. That is immaterial. It is the fact that you are after whether these applications were considered.

Q. Well, where was that land situated?

A. That land was situated in the grant.

Q. I understand, but where?

A. Well, I am coming to that. Don't get impatient with me. I am kind of slow. That, as I recollect, was southwest of Eugene, somewhere in the neighborhood of the McKenzie River, somewhere where some sons of hers were interested, and she referred to friends of hers who bought very largely, Michigan interests, Michigan people. I believe she referred to the interests now in control of the Booth-Kelly Lumber Company. While she made a great fuss about that timber that was for speculation, not for any immediate use at all, and that fell through. It must be remembered that in the fall of 1907—meanwhile the work of getting records together and keeping up field work had been going on ever since the fire. In the fall of 1907 the great crisis struck New York, and, as you may remember that, it put a pretty effectual stop to every kind of industry, speculation in timber land and everything else as well. People didn't have the money to buy, and my recollection is that the effort to acquire timber land when the Railroad Company was in no posi-

tion to sell it stopped about that time as everything else did, and I think that it was pretty effectually stopped until some time in 1908 or 1909. Meanwhile the suit had intervened and that stopped things. I don't think anything was done in 1908 that I remember of.

Q. How many times did you see Mrs. Potter Palmer?

A. I think twice.

Q. I thought you said several times?

A. Twice, I think.

Q. Did Mr. Harriman go with you, did you say?

A. He did. He did.

Q. Did she designate the lands that she wished to buy?

A. She did, and, as I have testified, I had them examined.

Q. Why did you have them examined?

A. Because they were applied for.

Q. Well, I thought you said she was a speculator and you would not sell to her?

A. We didn't sell to her.

Q. You didn't have to have the lands examined to determine whether she was a speculator or not, did you?

A. Oh, possibly.

Q. You did?

A. Certainly.

Q. You had to have the lands examined to determine whether Mrs. Potter Palmer was a speculator in these lands?

A. Whether she intended to speculate in these lands, yes.

Q. Well, how could you tell from an examination of the lands?

A. Well, you can tell sometimes from the location of the land. It is queer but it is the fact. And you can tell very frequently by your conversations, your conferences with people, what they propose to do with land. That might not have appeared in the first instance. The first instance was that there was an application came out to me and the cruising was done as rapidly as possible and the papers went on to New York about the time that I went down there, and Mrs. Palmer came there about that time.

Q. Well, you knew who Mrs. Potter Palmer was when the application came in, didn't you?

A. Oh, yes.

Q. You knew she had some interests near Eugene?

A. I didn't at the time when the application came in; I knew it afterward.

Q. But then you knew her general history as Mrs. Potter Palmer of Chicago?

A. Oh, I knew she was financially responsible, I

suppose.

Q. And you knew who she was?

A. Oh, yes.

Q. In a general way?

A. Oh, yes.

Q. When her application to buy these lands came in you sent a cruiser out to have them cruised?

A. Yes.

Q. And the report of the cruiser was sent East?

A. Yes, sir.

Q. Do you remember whether the report of the cruisers included anything other than the general character of land and an estimate of the amount of timber?

A. Just the usual data that a cruiser turns in, the character of the land, the character of the timber, the classification of it, and the——

Q. (Interrupting) Value of it?

A. The value of it.

Q. Well then, you and Mr. Harriman went and called upon Mrs. Palmer?

A. At her request.

Q. Did you ask her whether she wanted the lands for speculation?

A. Well now, to go into that, the incidents of that call, the last call developed the fact that Mrs. Palmer not only wanted that timber but she wanted to buy

all the timber in about six townships down the east side of the grant, along about I think opposite or in the neighborhood of the Booth-Kelly holdings. There was no immediate intention on her part to make use of them. The first application she made was for a comparatively small body of timber that might have been, though it was not immediately tributary it might possibly have been used for some small milling operation, but when we got down to talk about it she had made up her mind, or changed her mind, rather, that she wanted a vast deal more, and the thing fell right there. We didn't cruise that timber; we didn't go on with it in my time. I think she abandoned the project.

Q. Now, do you recall any other applications to purchase during that year?

A. I might if I had time to think it over, but I never charged my mind with things of that kind, though other applications were undoubtedly made and probably other cruisings made. As I have already testified that in 1907 my work proper was finished in the summer of 1907, and early in September, 1907, I resigned, sent my resignation to Mr. Harriman, and instead of accepting it he ordered me to New York and my office was there during the remainder of the time in which I was connected with the road. I was here for about one week after that. That was all.

Q. Was there any policy adopted at that time not to sell timber lands to speculators?

A. I don't remember of any such policy being defi-

nitely enunciated. No orders given, if you mean that. I don't know of anything of that kind being done. But it had been my recommendation long before not to do it.

Q. Well, you mean then that the application of Mrs. Palmer was turned down because she was a speculator?

A. I can't say so in terms.

Q. Well, what has her being a speculator got to do with it? That is what I am trying to get at.

A. It has a very great deal to do with it, in tying up timber land for an indefinite time, just as has been done here. A very, very small fraction of the timber that the Southern Pacific, or the Oregon and California has sold since 1898 has ever been milled. It has just been held for the rise.

Q. Held for the what?

A. Held for the rise.

Q. Oh, yes.

A. Just the increase in board measure per annum in these large purchases is more than interest and taxes, and that is why they can carry it and why they do carry it. The Oregon and California Railroad has sold the most valuable timber in all this holding, allowed them to cull it and sold it at less than twenty cents a thousand feet board measure.

Q. Now, your idea is that the Railroad Company should hold it and get the benefit of the rise?

A. Not at all; it never has been; but—

Q. Well, how does it help the state industrially to have these lands held by Mrs. Potter Palmer? I mean by the Railroad Company instead of Mrs. Potter Palmer?

A. It helps it to this extent: That the Railroad Company has no intention of holding it in mort main.

Q. Oh; and Mrs. Potter Palmer has?

A. Yes, undoubtedly. Anybody that comes in and wants to buy all the timber in six townships of land, you can take it right straight that they have no immediate intention of doing anything with it. And that is borne out in the case of every large purchase, and I don't except any, because of the purchases made by the Booth-Kelly Lumber Company, even, of seventy thousand acres, probably more than that with what they acquired indirectly from the railroad, of that very, very little has been cut. They bought it so cheap that it is more profitable for them to hold it, and that is why Mrs. Palmer and everybody else wanted to buy very cheap and of the Railroad Company. So far as my connection with the Railroad Company goes and my suggestion to it was that you could afford to proceed with your sales of timber at these very low prices but you must provide for some kind of use being made of it industrially and not allow it to be tied up, because in that way it is simply strangling industry, and, by the way, prevents that competing road you were talking about a while ago.

Q. So that your idea was that the Railroad Com-

pany should hold this land so as to prevent somebody else from strangling industry?

A. No, no, not at all. The Railroad Company could not do so. That is self evident from the map. You cannot tie up the country with a checkerboard map. You can't do it. You can by selling to these large holders, because they can and they do body up their timber, and they can make a complete monopoly and they can limit output. They may do about anything they please. The Railroad Company can't, you could not tie up—you can't make a monopoly of a single section, nor of a dozen sections, nor of a hundred sections, if you have got the same amount of land of the same character intervening which may go into private ownership; but the minute you turn it over to a single individual who can and who does body the country up, as the Weyerhauser Timber Company has done, you are simply tying up that country and you await their good pleasure; that is all.

Q. Do you mean that the Booth-Kelly Company and the Weyerhauser Company and these other large purchasers after acquiring the railroad lands bottled up the even numbered sections?

A. Certainly. That is what the Railroad Company never did, never intended to do, never could do.

Q. So that the ownership of the odd numbered sections by the Booth-Kelly Company, or the Railroad Company, or anybody else, is necessarily a leverage which will control the even numbered sections, isn't it?

A. Not at all, not in the hands of the Railroad Company.

Q. Why not?

A. Because, as I have said, the Railroad Company has not, cannot and will not if it could, body up the timber. It never has attempted to, never intends to do so, and could not do so.

Q. Why couldn't it?

A. In the first place, it is not transportation business. I believe, as you gentlemen would all call it, it is ultra vires. They are not authorized to go into the timber business. They would have no object in bodying up timber if they were not.

Q. Now the Southern Pacific Raliroad Company in California was not authorized to go into the oil business, was it?

A. It may not have been, but——

Q. (Interrupting) I say it was not, was it?

A. Not that I know of.

Q. But it had no difficulty in organizing a subsidiary corporation called the Kern Trading & Oil Company and engaging in the oil business, did it?

Mr. Fenton: We object to that as wholly irrelevant, and, as I am informed by Judge Singer, not the fact in the case, and a matter about which the witness would have no knowledge.

Mr. Townsend: Well, the witness approved the lease.

Mr. Fenton: And wholly irrelevant in this case.

Witness: I approved the lease?

Mr. Townsend: You approved it or disapproved it. You know the fact.

Witness: Well, you know the difference between approving and disapproving it.

Mr. Townsend: Well, it doesn't make any difference, you are acquainted with the fact.

Witness: It makes a great deal of difference, going into this record at this time. I never approved any lease.

Q. You know that the Kern Trading & Oil Company was organized in California as a subsidiary organization of the Southern Pacific to operate its oil lands, don't you?

A. The Kern Trading and Oil Company is a corporation organized I believe under the laws of California, and more than that I don't believe I know much about it, as my evidence involuntarily and otherwise in this Elk Hill suit will show that I didn't know what the purposes of that Company were, and I don't now.

Q. Do you mean to say if the Oregon and California Railroad Company here in Oregon wished to block out these timber lands that you do not know that they could organize a land company and do it, and no question of ultra vires would intervene?

A. I don't believe that is a supposable case between us.

Q. It could not be done?

A. I don't believe it would be done.

Q. I am not asking whether it would be done, but is there any legal obstacle in the way of it?

A. I can't say.

Q. "Do you mean to say if the Oregon and California Railroad Company here in Oregon wished to block out these timebr lands that you do not know that they could organize a land company and do it, and no question of ultra vires would intervene?"

A. So far as that calls for a legal conclusion I must decline to answer, because I don't know. As to the practical question, which I take to be the only question here, it is that such a thing is not a supposable case even.

Q. Well now, you had no difficulty in answering a similar question when it was addressed to you by the Southern Pacific people in May, 1905, concerning which you testified yesterday, did you?

A. May, 1905? I don't recollect what you refer to.

Q. Do you remember that you testified that the letter that you wrote to Mr. Dunne with reference to the transfer of an entire grant was with reference to the question of organizing a land company and transferring the entire grant to that company?

A. That had reference to the transfer of a land grant to a land company operating not as a usual land company does for the purpose of acquiring property, but for the purpose of merely selling the rest of that grant.

Q. Well, do you mean to say that you don't know

whether a land company so operated, so organized, could acquire other land?

A. I do not know. It would depend entirely upon its articles of association.

Q. Well, couldn't its articles of association so be drawn that it could?

A. I haven't any doubt that it might be.

Q. But you see in the fact that the Booth-Kelly Company has acquired over seventy thousand acres of this land an industrial menace that you do not see in the holding of two million three hundred thousand acres by the Railroad Company?

A. They are entirely different cases. In one case the lands were acquired for a certain purpose. They were acquired by reason of certain acts which the Railroad Company had consummated. In the other case this property was acquired from the Railroad Company presumably for industrial purposes. The Railroad Company is not authorized, as I understand it, to go into any manufacturing business. If it has this land, which it got honestly and openly, it certainly has the right to dispose of that land in such a way as will do to the railroad the most good, and you can't do the railroad any good without doing this whole body politic in here the same measure of good. There can be no throttling of industry that does not injure the railroad, and there can be no expansion of industry without benefiting both the state and the railroad. Those are self-evident, hardly

worth mentioning but I just set them down.

Q. Well, then, it necessarily follows that the logical thing would be to transfer all the lands in the state to the railroad?

A. No, not at all.

Q. Why, if you think that the industrial interests of the railroad and the industrial interests of the state and the interests of the railroad as the proprietor of the lands are identical, then you mean to say that there would be no industrial injury if the Railroad Company owned all the lands, do you not?

A. No, I can scarcely agree with the logic. It seems to me faulty. This is a case where the railroad finds itself possessed of certain property, with certain industrial capabilities. As I have testified over and over again, so far as I am concerned,—and my acts, reports, everything, speak for themselves,—the Railroad Company tried this experiment for years of disposing of timber lands to whoever would come for them and let them cut out what they wanted and practically at their own price. As I have said heretofore, the net result of that was that the Railroad Company sold timber, standing timber, merchantable timber, for less than twenty cents a thousand feet on the average. I believed, and so recommended, that the selling of timber at such very low prices up to the present time had but one effect. That was to tie the timber up. It was more profitable to hold it than it was to manufacture it. Now the only suggestion that has been put to the railroad by me has

been that the timber land should be sold, but it should not go to augment any more large holdings, because there is no reason for doing so, no commercial reason for doing so. It limits the number of operators in the state. My recommendation was specific to the point that the small mill men should have a chance and not be compelled to go to these large holders and get at a large price what they needed for their mills. I believe that is the proper policy. Anyhow, it is what I recommended.

Q. Now you say it was more profitable to hold these timber lands than to mill the timber off of them?

A. It was in the hands of these people who bought at that price.

Q. Well, do you suppose that they have not been aware of that fact the same as you?

A. Oh, undoubtedly.

Q. The truth of the matter is that the price of lumber and other commercial conditions have rendered milling enterprises unprofitable for the last few years; isn't that so?

A. I am not familiar with prices of lumber or building conditions. I have not followed them since I was in the Railroad Company. I do know, however, and I know from talking with the people who are interested, that the whole northeastern end of California—I say the whole; a large part of it; Modoc, Shasta, Lassen counties—is owned by the T. B. Walker interests, and they began to acquire those interests in 1889. They

bought out timber concerns and mills and shut them down and they have existed all this time simply upon the increase in the growth of the timber which, as I have told you, is large enough in timber of certain age to more than equal the taxes and interest on the investment; and in this particular case it must be remembered that this timber was sold by the Railroad on conditions that never were duplicated that I know of in this country. Take the Booth-Kelly Lumber Company, for instance; it bought tract after tract and gave contracts which required practically no payment of money, which created at once a credit by which they could borrow money, and the Railroad Company got no benefit from it.

Q. Well, you know that the Northern Pacific sold all of their timber lands to the Weyerhausers, substantially, don't you?

A. Yes, they did, and they were sorry for it afterward.

Q. I know, but why are you picking out the Booth-Kelly Company as the great depredator in all these transactions?

A. Because it was.

Q. What is it?

A. Because it was, certainly.

Q. Yes, you have personal feeling against Booth-Kelly Lumber Company, haven't you?

A. Absolutely none whatever.

Q. When you came out here you suspected that

there had been some improper influence by which they had obtained exceptional terms from the Railroad Company, did you not?

A. When I came out here I had never heard of them.

Q. After you came out here and learned of these sales you did, did you not?

A. When I became aware of what was done and became aware and received their calls and their demands, and when I had their depredations reported every week and knew the unusual terms that had been granted to them, I saw by looking into those affairs that that kind of business was not good for the railroad and was good for nobody but the people interested in that enterprise; that is all.

Q. You even went so far as suspecting some of the Southern Pacific officials with having been in collusion with the Booth-Kelly Company, didn't you?

A. I didn't suspect.

Q. You didn't suspect it?

A. No.

Q. You knew it?

A. I knew that they were interested with them in certain purchases.

Q. Who?

A. Oh, is it necessary to go into those old things?

Q. I want to know why you have such a feeling

against the Booth-Kelly Company.

A. So far as Booth-Kelly is concerned, I have mentioned Booth-Kelly for the reason that they were the largest purchasers, individual purchasers, I believe. They were the most active, and it was a typical case and it is a typical case in regard to this grant. Now it don't make any difference to me who has the Booth-Kelly, who is interested in it, but when you are discussing this grant you will sooner or later come right back to that. How did it work in those cases? They had the largest number of contracts. They had the most unusual contracts granted, and their whole connection brought out a great many protests from other timber buyers, and large ones, wanting to know why they should have these special privileges, and all that sort of thing, and I could not—

Q. (Interrupting) Now, just a moment right there. Who made those protests?

A. Well now, let's see. Those protests were made by different lumbermen in the East for instance. I have a recollection of one man, whose name I can't recall, who was a large timberman in the East whom I met on Mr. Kruttschnitt's private car on a trip East in 1904, who asked me the direct question why they and why other large timber operators could not get the same privileges and the same terms as Booth-Kelly. I had to disclaim, because so far as I knew there was no reason; the only fact was that they had it; they were on the ground; they were the most active, energetic, and they were conducting mills.

Q. Now I want you to put into the record the contracts that you say constituted special privileges to the Booth-Kelly Lumber Company.

A. Well, do you expect me to give them by number and description of the land?

Q. No; I want to know it so I can trace it up and see whether you are correct.

A. You can just call for the record of those contracts.

Q. They are here in evidence. You can look them through.

A. Show them to me.

Mr. Townsend: Where is that exhibit of defendants' contracts of January 1st, 1903? (Counsel here refers to exhibit.) Now I want you to point out the contracts.

Witness: What is it you want?

Mr. Townsend: I want the contracts that the Booth-Kelly Company had when you came here and that you found and which you criticise as having extended to them special privileges that were not extended to other purchasers of timber land?

A. You can't show that by that record.

Q. Why not?

A. Why, because it don't show the terms.

Mr. Fenton: Those are the outstanding contracts.

Q. I don't ask you to find the terms in this record, but I ask you to designate the contracts.

A. Well, anything you find in there that is Booth-Kelly, or John F. Kelly, Trustee; and I think a large number of those shows no assignments. There are a great many that were acquired; and, as I have testified, that they bought directly seventy thousand acres and acquired about thirty thousand more, which makes a hundred thousand acres of timber, and they claim by their advertisements and published stuff to control and have an ownership of about ten billion feet of standing timber. I don't vouch for that fact; that is their own statement.

Q. Now any contracts that they bought by way of assignment, certainly they got no concession from the Railroad Company as to them, did they?

A. No, not at all.

Q. Now the principal contract that you have in mind, and to be frank with you, which I thought you would refer to, was the contract for about twenty thousand acres to John F. Kelly as trustee?

A. No.

Q. Is it not?

A. I didn't have that in mind.

Q. You didn't have that contract in mind?

A. No, I didn't have that in mind.

Q. They then didn't get special privileges as to that contract, did they?

A. The Booth-Kelly Lumber Company?

Q. Yes.

A. As assignee, yes.

Q. Well, how did they get it as assignee when the Railroad Company sold it to someone else? and they had to buy it from that other person?

A. I am merely stating the fact as I believe it is and has been reported. John F. Kelly was a member of the firm. George H. Kelly was. Booth was, J. H. Booth and R. A. Booth, and that contract was, I believe, though not in my time that I know of, assigned to the Booth-Kelly Lumber Company.

Q. Well, how does that show that the Railroad Company extended special privileges to the Booth-Kelly Company in the sale of that land?

A. Well, you are talking about all the contracts, aren't you?

Q. I am speaking about that particular contract. Let's get through with that one.

A. Well, suppose we talk about the contracts made directly to the Booth-Kelly Lumber Company. Wouldn't that be within the purview of your inquiry?

Q. No; I want to finish with reference to that contract with John F. Kelly, Trustee, first.

A. Yes.

Q. Now in what respect did the Booth-Kelly Company get any special concession or privilege with reference to that contract?

A. Well, I will tell you, that contract covers about

three townships of land, as I recollect it. Now, mind you, this is a good many years old.

Q. Well, your recollection is correct.

A. Very well.

Q. It is townships twenty, twenty-one and twenty-two south, range one west.

A. I compliment you on your ability to remember the location. I could not. That contract was made in such a way, and the privilege granted was of this character: Pieces of timber were taken out of a whole section, the whole thing was riddled up and down one side and another, so that the remainder of the timber on that purchase must come to the holder of that contract at practically his own price. Now I say that constitutes a special privilege. It ought not to have been sold that way.

Q. Well now, Mr. Eberlein, isn't it possible that you are mistaken about that?

A. I think not. I would refer to the contract.

Q. Now that contract is of record there, and if it were not for the fact that it would unnecessarily delay your examination I would like to have you take a set of township plats and map them out, because I did it this noon.

A. I mapped that once. I believe that map is still in the files of the Railroad Company in New York.

Q. Well now, do you not know the fact to be that

the Railroad Company placed their price upon that land and that Mr. Dixon and Mr. Kelly and other comparatively small stockholders of the Booth-Kelly Company, tried to induce that Company to buy the land, brought it before their board of directors and the company refused to buy it, did not consider it a good buy, and that was why Mr. Kelly and a few of his associates bought it for their own personal speculation?

A. I think very likely that is true.

Q. Well now, if this was such an unusual privilege to the Booth-Kelly Lumber Company, how do you account for the fact that they refused to buy it on those terms?

A. Now, just let's get that straight. You have picked out a contract which was not made to the Booth-Kelly but was acquired by them by assignment. Now, you see your inquiry tends to confuse me; whether it will confuse the Court I don't know, but it confuses me. Now we will just keep those things separate. I don't claim, nor do I think you do, that the making of that contract to John F. Kelly, Trustee, even though among them were these same men, same stockholders of the Booth-Kelly Lumber Company, was binding upon the Booth-Kelly Lumber Company, but they got control of it by assignment afterwards. I think the facts that you state are undoubtedly true.

Q. Do you not also know it to be a fact that these same men, Mr. Eberlein, who had tried to persuade their company to buy it and the Company had refused to do

it because they didn't consider it an attractive purchase, that after they had made three or four payments the Company finally changed its mind and bought it back from these men at an advance of something like ten dollars an acre?

A. I don't know anything about that. I only know the fact that they did. But that is not what I was referring to in my testimony. As I tell you, I didn't refer to that particular contract.

Q. Well, you must have had that contract in your mind or you would not have had it platted up; you say it is now on the records of the Company?

A. I think it is.

Q. You certainly had it in mind at one time?

A. Well, I know; but I didn't necessarily have to connect it up with the Booth-Kelly Lumber Company. It was an improvident contract, and as such I characterized it; and it was. And that is the policy, not only the Booth-Kelly but all of them, of large purchases to which I objected. Now don't put it on the ground that I have any particular grudge against Booth-Kelly, because I haven't. I don't care anything about them.

Q. Well, I am afraid that the import of your testimony would give that impression, Mr. Eberlein.

A. Well, then, it would weaken my testimony, would it not?

Q. Not if it were well founded; not if you had grounds for it; but if you don't mean it that way I want

the record to correctly represent your feeling on that.

A. Well, I am here to give you the facts. The fact is that probably the reason why I have mentioned them more than any other is that I had more to do with them than any other; I had more trouble with them than anybody else.

Q. Now when Mr. Dixon came to San Francisco and asked to see certain records in your office what records did he ask to see?

A. I have a recollection on two or three occasions that he demanded—he didn't put it very much in the way of a request, either, but he was pretty insistent on seeing our cruisings on certain timber lands; what timber lands I don't pretend to recollect.

Q. Who brought him into your office?

A. Oh, I don't remember that.

Q. Who sent him there, if you know?

A. Sent him to the office?

Q. Yes.

A. Well, I presume he knew the way there and came.

Q. No, but who introduced him into your office, if you know?

A. Well, now, my recollection is that I didn't meet him at all.

Q. Do you remember the fact to be that Mr. Herrin introduced him into the office?

A. Not that I know of. He may have been to Mr. Herrin, as a great many people did go to Mr. Herrin; when they wanted to do business with the land department and they thought they might not be able to do business with me they went very often to Mr. Herrin. Now that you mention it I have a recollection of somebody, a messenger or somebody coming down from the law department with the information that Mr. Dixon wanted something and he wanted it right away, and I said, "Who is Mr. Dixon?" And he said he was some connection to the Booth-Kelly Lumber Company. I merely said that if Mr. Dixon had any business to do with the land department he had better come down. He never came.

Q. When did he make the request for these cruisings?

A. I think that same time. That is my recollection.

Q. Well, you say that your only recollection of it is that a mesenger came down?

A. Yes.

Q. And said he wanted some information?

A. He did. I am giving you the recollection.

Q. And Mr. Dixon never came down himself?

A. He didn't come to me; no.

Q. I understood you to say that Mr. Dixon came and made certain demands and rather in an offensive way?

A. It was. The way it came about may have been the fault of the intermediary, but the demand was a pretty peremptory one, as I recollect it, to send out of the office, not to the law department but to Mr. Dixon, who was I understood up there at that time, certain documents, and my recollection is that those documents were not in existence at that time and could not be sent. That is, that the cruisings had not been made. He probably had been advised or thought probably that we had restored certain cruisings.

Q. Now, did he ask for the cruisings, Mr. Eberlein, or the price that you asked for the land?

A. No; it was papers, Mr. Townsend. If it had been price there would not have been any—that would have been very easily answered and he would have been answered at once. But the extraordinary demand for papers belonging to the department to be sent out of the department to a man who had no connection with the department and whom I didn't know at that time rather made an impression.

Q. Well, you know that the man who came into your office was an employe of the Southern Pacific Company?

A. Oh, I don't remember anything about that. I don't charge my mind with a lot of detail of that kind, but the man probably I knew or probably he came to my assistant; I can't tell you. But that is the way it got to me. I am giving you the fact as I remember it.

Q. Well now, the upshot of all this is that you considered that all of the timber land had been sold in Oregon that could be used by mill men legitimately for sometime to come?

A. No, not at all; all that could be used within a reasonable time by the large purchasers. There were other men in Oregon who were not men of large capital at all, but who had small mills and were turning out ties and timbers, and I believed that those men ought to be fostered, and I think so yet.

Q. Well, did any of them apply to purchase any of these lands during the years 1906, 1907 and 1908?

A. Well, there were indirectly several sections of timber turned over to Cole Brothers and to Fisher Brothers. Those are two I remember. There may have been others. But it only illustrates the policy which I wished to pursue.

Q. Well, those were turned over by the Southern Pacific Company and not by the Oregon and California Railroad Company, were they not?

A. For the reason that the Oregon and California Railroad Company, under contract with the Union Trust Company, could not enter into the kind of an agreement that was necessary to enter into with those men.

Q. But the fact is that those lands were first conveyed by the Oregon and California Railroad Company to the Southern Pacific Company, were they not?

A. So we got our money for them. The Oregon and California got their money .

Q. And it was a year or two afterwards that the Southern Pacific Company made its dealings, whatever they were, with Cole Brothers and Fisher Brothers?

A. No.

Q. If I have the names correctly.

A. Yes, you have the names correctly, but you are mistaken as to that fact. They were at work in 1906 on those lands, and as I recollect it and as my information goes, we made a price on those lands to the Southern Pacific Company, who took them over in order to get necessary supplies to keep open the lines of this operating company. They paid for that to the Oregon and California Railroad Company and the money was turned over to the representative of the bondholders. Now the Southern Pacific Company, as I recollect it, made a contract with these men agreeing to take their output, paying them, they returning such part of it every month, the cost, to the Railroad Company, because they were not in funds to enable them to buy outright. And that was a very good arrangement for them; it enabled them to make more than days' wages, which they could not have done if they had to go to any one of these large timber owners and buy the timber.

Q. The Southern Pacific Company took most of the product of their mills, do you mean?

A. I think it took it all, and paid for it current prices.

Q. Then, when you get right down to it, the fact of the transaction was that that was the method by which the Southern Pacific arranged to supply itself with ties and building material without actually operating the mill itself?

A. Certainly. That is right. They did, though, operate mills themselves.

Q. I understand, but I am talking about these particular mills?

A. Yes, sir; that is right.

Q. Now in grading these lands as agricultural lands, lands that were capable of settlement, as has sometimes been said in the course of the examination, you did not do that with any idea of complying with the laws involved in the case at bar, did you?

A. Well, do you mean having this land appraised?

Q. Having them classified as agricultural or settlement lands; you didn't do that with any idea of selling the lands within the terms of the grants which are involved in this case?

A. If you mean this little accident of a few lines that old George W. Julian slipped over on Congress there, why of course not. We never pretended to, never entered into any calculation at all.

Q. You have apparently the same feeling towards George W. Julian that you have toward the Booth-Kelly Lumber Company?

A. Oh, no. One man was a common nuisance; I don't say that of the Booth-Kelly Lumber Company.

Q. Which one was that?

A. Julian.

Q. Oh, yes. He was a member of the Joint Committee of Congress in charge of the conduct of the War of the Rebellion, was he not?

A. He was a member of Congress from Indiana, and I came from that general part of the country, and, as I remember, he had a reputation of being an objector to anything and everything, a mischief maker; and there was a sigh of relief when he retired from Congress.

Q. Relief to the railroad companies, do you mean?

A. Relief to Congress, to the suffering people.

Q. It was under his leadership that the policy of granting lands in aid of internal improvements finally ceased, was it not?

A. I don't know as to that. I was pretty small at that time.

Q. Well, you ought to remember the good things about him as well as the bad, no matter how small you were.

A. Probably his obituary notice takes care of all of that.

Q. You have just concerned yourself in finding out what you could that was bad about him; is that it?

A. Oh, no; no; but unfortunately the evil that men

do lives after them, and that is the only thing that has survived that I know in regard to Mr. Julien.

Q. You haven't read my brief?

A. No. I have been intending to take a week off to read that. I hear it is a good one, and I am going to read it, I will promise you.

Mr. Fenton: It will take more than a week.

Q. Would you have put any of the agricultural lands on sale to actual settlers only in quantities not greater than one quarter section to one purchaser and for a price not exceeding two dollars and fifty cents per acre?

Mr. Fenton: Objected to as immaterial.

A. If I had the sale of it I would have sold the agricultural land first to the adjoining proprietor, if he wanted it, the man that had struggled along making a farm down there in that country, and if there was any adjoining land which he might make use of by incorporating it into his farm he should have had the opportunity first, and that was what we endeavored to do, and I would not have cared anything at all about the amount or the price.

Q. Well, you would have cared about the price, wouldn't you?

A. I would have got a reasonable, fair price for it, on general principles, and for the particular reason that the contract with the Union Trust Company, the deed of trust, provides that the land must be sold for a fair

actual value, and they refused on several occasions to pass deeds on the ground that the consideration was not large enough.

Q. But you would not have paid any attention to this little joker that you describe as having been slipped over on Congress by Mr. Julien?

A. No, sir, I would not.

Mr. Fenton: Defendants admit that they would not have paid any attention to the priviso of April 10th, 1869.

Mr. Townsend: Or of the similar provision of May 4th, 1870?

Mr. Fenton: Or of Section 4 of the Act of May 4th, 1870, with respect to the limitation on the grant, which was not a valid limitation among other things and never was recognized by the Company and never was insisted on by the United States until April 30th, 1908.

Witness: And it was disregarded by every respectable attorney in the state that ever examined the title.

Mr. Townsend: Now I will pause for a moment for Mr. McAllaster and Mr. Singer to extend their remarks into the record, so that there may be a complete representation on this subject.

Mr. Singer: Well, I would suggest a limitation of Mr. Townsend, who is a respectable lawyer, and he has a different opinion, and you didn't mean it that way.

Witness: Oh, no.

Mr. Singer: Mr. Townsend is certainly a respectable lawyer and the equal of any of us.

Mr. Fenton: Let's not put all of that in the record.

Witness: No, don't put this in the record, but Mr. Townsend knows I had no intention of applying these remarks to him.

Mr. Townsend: Well, the record will show for itself how those remarks were intended.

Q. The fact is, I think, as has been developed from the testimony, but to make it positive I will ask you, that no lands were sold during the years 1906, 1907 and 1908, with the exception of the conveyance to the Southern Pacific Company, if it took place during those years? I am not certain of the date of that, but with that exception there were no sales of any of these lands, were there?

A. That is all I recollect at this time.

Q. Now you say that in the fall of 1904 Mr. Craig, who was the Joint Passenger Agent of the Oregon Railway & Navigation Company and the Southern Pacific lines in California, after conference with you upon the subject caused circulars to be issued announcing the intention to resume the sales of lands that were susceptible to cultivation?

A. I don't remember the limitation in the advertisement. It was general in its terms and referred to the approach of the time when land grant lands would be offered for sale.

Q. Well, you say it was designed to attract set-

tlers?

A. Yes, sir. It wasn't a special circular; it was something inserted into a pamphlet that was put out by his department.

Q. You say that it was expressed in flamboyant terms, lurid colors and lots of adjectives?

A. Yes, that is right. I don't mean this particular notice, because as I recollect it I wrote it myself, but the general literature in which it appeared was ordinary railway literature of that character.

Q. Now you say that after the fire in 1906 you had no means of knowing what deeds had been executed. Did you not know that in May or June, 1879, the Oregon and California Railroad Company through its board of directors adopted a bylaw prohibiting the execution of any conveyances on behalf of the Company unless the same were specifically authorized by resolution of the board of directors and that thereafter no deeds were executd until authorized by resolution of the board of directors and that the minute books of the meeting of the board of directors disclosed all deeds that were executed after that time?

A. I may have known that fact, and I have no doubt that we exhausted all the means of information that were open to us and that among them. But I don't recollect of having recourse to that particular source. I do remember of going to the Union Trust Company and getting a lot of information.

Q. Now you say that in 1906 by the latter part

of August this rumpus and noise that had been stirred up with reference to forcing the Railroad Company to dispose of these lands had become so great that you gave notice to your superiors that you were able to sell agricultural and grazing lands; that is true, isn't it?

A. Well, I gave notice to them that we were in position to go ahead and to treat applications for that class of lands as rapidly as they could be examined.

Q. Now from whom did you learn that the Booth-Kelly Company had made threats that they would force you to let go of this land?

A. Directly.

Q. From whom?

A. A talk with Mr. John W. Blodgett at one time.

Q. When?

A. In New York, in my office there, I think during the year 1907. There was a great deal of talk indulged by them which traveled to me—I speak of these talks, these particular conversations—that we would be obliged to let go. I didn't pay much attention to the talk at that time but it was current.

Q. Well, who did you hear say it personally, John W. Blodgett, you say?

A. Why, I refer to my talk with Mr. Blodgett more than anyone else.

Q. And what did Mr. Blodgett say?

A. I can't remember the exact language.

Q. Well, give the substance of it?

A. But Mr. Blodgett is a courteous gentleman and would not be apt to use brutal language at all, and in that case it was simply a very positive intimation on his part that we would have to do it. I believe at one time in one conversation—I had more than one; he was in my office there several times; one time Mr. Arthur C. Hill was with him; among other things he made bitter complaint to me in criticism of the railroad by reason of their running mills, that we had no right to run mills and that they ought to buy their stuff from them; and I told him that the only reason the mills were ever started or operated was simply because they canceled their contracts and refused to furnish any stuff when the company most needed it. But that can hardly be urged against them, because the market at San Francisco took a tremendous jump, and they paid large bonuses for furnishing lumber quickly; but the Railroad Company was criticised very severely by them.

Q. Well, I understood you to say that the Booth-Kelly Company boosted the price on ties from twenty-three cents to over sixty cents over night?

A. They did, so I was advised.

Q. Now you say that the market price raised at San Francisco now?

A. Why, of course. It certainly did, by reason of the fire.

Q. Well, the Booth-Kelly Lumber Company was not the only party that supplied ties and building ma-

terials at San Francisco, was it?

A. No, no; a great many others.

Q. Well, who was it that boosted the price?

A. They did so far as I was informed. Probably the rest did, too; but as I understand it they were the main dependents of the road; from their geographical position the lower end of the road in making their extensions always got their supplies from them.

Q. They didn't boost the price, then; they simply took advantage of the advanced price?

A. They took advantage of the advanced price, but it had the same effect upon the Railroad Company; it left them helpless.

Q. That is, the Railroad Company had to pay the market price for the stuff?

A. The contracts were canceled, as I was informed by Mr. Harriman himself, practically without any notice. Now of course there may have been reasons for it, but still it was very burdensome upon the Railroad Company, and it might be urged, I think justly, that the Railroad Company should have notice in a case of that kind; but I am not making any point as to that.

Q. Now you say that Mr. Dixon was present before Congress in the year 1908 or 1907, and assisted in the passage of the resolution directing the institution of this suit?

A. Why, he appeared before the committee of the House, which you addressed.

Q. Well, did he urge the pasasge of the resolution?

A. Yes, sir.

Q. Well now, don't you know that he was the only opposition I had during the entire effort I made to get that resolution through?

A. No, I don't.

Q. Don't you know that he first tried to amend it and afterwards tried to defeat it?

A. I don't know anything about what his lobbying was, but I know what his remarks were before the committee.

Q. Well, what were his remarks before the committee?

A. Well now, I think they are quoted. I make a quotation in that document there. I will not undertake to repeat remarks; I will read them to you.

Q. Well, if you take out any isolated quotation it might not fully represent the position that he took before the committee.

A. Well, I believe it did. Now what you refer to, you may think that I knew of Mr. Dixon's activities down there but I did not. It may have been known to others in connection with the Railroad, but not to me. I merely appeared before that committee with Mr. James Gore King, who was the representative of the Union Trust Company. We came down from New York to attend that hearing, and those remarks were made by

Mr. Dixon, and the understanding of his attitude was the same by Mr. King and myself. That is why we never had any reason to change our opinion that he was there throwing the burden of everything on the Railroad, claiming the dubious honor of having fomented all of this agitation for the purpose of depriving the Railroad Company of a land grant. I believe his language is not susceptible of any other construction. What his subsequent acts were I don't know anything about.

Q. Now did Mr. Dixon or any other representative of these purchasers do anything before that committee other than to contend that they had purchased their lands in good faith, without knowledge of these restrictions, and asked to be relieved by an amendment to the bill or resolution?

A. I remember the address of Mr. Blodgett and of Mr. Hill, and my recollection is that theirs was along that line. They testified, too, as to the non-agricultural character of the land which they had purchased, and I don't remember of their making any direct onslaught on the Railroad Company, but it was different in the case of Mr. Dixon, though I understand he represents the same company that Mr. Hill and Mr. Blodgett did.

Q. Now you say that Mr. Hawley, Congressman Hawley, he also made a campaign upon this same general subject?

A. Yes, sir.

Q. And that he was a colleague of Mr. Booth, who

was a member of the Booth-Kelly Lumber Company, or, at least, was very friendly with him, you say?

A. I have understood that he was, that they were very close together, socially and otherwise.

Q. And the fact was developed during the course of your direct examination that Mr. Hawley was very instrumental in getting through the resolution directing the institution of this suit and also instrumental in getting through the recent act authorizing the compromise of the purchaser suits. Do you mean to imply Mr. Hawley has been actuated in this matter by a desire to help the Booth-Kelly Lumber Company?

A. Why, that wasn't my direct testimony at all. I don't think it can be inferred from it. Mr. Hawley in doing what he did I have no doubt did what he thought was right and in accordance with campaign promises he had made.

Q. Well, do you mean to say that your direct testimony did not develop the fact that the Booth-Kelly Company had started this agitation, and that Mr. Hawley then carried it on in his campaign and was a great friend of Mr. Booth, and that afterwards when he went to Congress he got through the act that would carry out the threat of the Booth-Kelly Lumber Company and had subsequently gotten an act through that would now galvanize the title of the Booth-Kelly Lumber Company, as you expressed yourself?

A. Well, I believe those are the facts as you have stated them.

Q. So you did think then that Mr. Hawley has been actuated in his public service in this matter by a desire to assist the Booth-Kelly Lumber Company in carrying out its original threat and now giving it entity?

A. That would be calling for a personal opinion and I don't care to give a personal opinion about these people.

Q. Well, isn't that the intention of your testimony?

A. No. My testimony is to try to stick to facts. I have been drawn into some discussion here, but as to that I don't think I will go that far. I don't care to impute or impugn Mr. Hawley's motives. I only know the fact to be that his campaign was contemporaneous with the events which you mention, that he went into Congress on a campaign of agitation against this land grant, and I believe that is the fact.

Q. Well, what special significance did you mean by calling attention to the fact that he and Mr. Booth were very friendly, to quote your exact language?

A. I believe that was called out by the examination, and I am merely stating what I have heard. You may call that hearsay.

Q. You say, "I understood that he and Mr. Booth were very friendly; they were both of the same faith."

A. Yes.

Q. "And prominent in those circles."

A. I believe that is true; and I say that that was

called out in examination.

Q. Have you in mind now anyone else who is very friendly with Mr. Hawley and was of the same faith and prominent with him in the same circles?

A. I don't know, I am sure.

Q. Mr. Booth is the only man in the State of Oregon that you call to mind who is friendly to Mr. Hawley and is of the same faith and prominent with him in the same circles?

A. If I were well acquainted in the State of Oregon I might be able to cite others, but at the present time I haven't an acquaintance that would justify me making any such statement.

Q. Well then, do you mean to say that when you called attention specifically to Mr. Booth that you did not mean to carry with it any implication of the motive of Mr. Hawley in this matter?

A. I believe again that my answer in that case was called out by examination, and I have stated the case. Now if there is a connection I think that it will appear right there.

Q. Well, what has taken place to call your mind so particularly to the friendly relations between Mr. Booth and Mr. Hawley and not to the friendly relations between Mr. Hawley and any other resident of this state?

A. I think it is a fair conclusion from known facts, if I may be permitted to testify to conclusion—am I?

Q. You have to a great many.

Mr. Fenton: Answer the question in your own way.

A. That the agitation, as I was informed and as I believe, started at Eugene. As I was informed and as I believe it was started through, largely so, members of the Booth-Kelly Lumber Company, and I think that this agitation was seized upon for campaign purposes and was used as such, and Mr. Hawley was the beneficiary of this situation which was thus created. I think that is a fair, reasonable, safe conclusion.

Q. Now, you also directed attention to the fact in your examination that Mr. Hawley was somewhat active in securing the passage of what is called the Innocent Purchasers Bill, by which the large holdings of these large purchasers have been confirmed?

A. Yes.

Q. Now, don't you know that that bill was passed unanimously by both houses of Congress?

A. It may; it may be.

Q. Don't you know that that bill was promoted by Senator Bourne, Senator Chamberlain, Congressman Lafferty and Congressman Hawley alike, all of them in favor of it?

A. Undoubtedly, though I don't know the fact; I don't keep up with such things.

Q. Well, why have you been keeping up with Hawley so much and not the rest of them?

A. Well, I haven't been singling out Mr. Hawley; as I say, his name has been called out in this examina-

tion.

Q. Well, I have called out the others?

A. Very well.

Q. Now don't you know about the others?

A. Why, what do you want me to testify in regard to the others?

Q. I ask you if you don't knew the others have been equally active and you say no?

A. I say I presume they were. They were all from Oregon.

Q. Well, do you know whether they were or not?

A. This condition, however, exists in Mr. Hawley's district, and this as I understand it was not the basis of any legislative campaign, congressional campaign. It may have been in Mr. Lafferty's case; I don't know; I presume it was. But I suppose all of the representatives in Congress at this time have taken advantage of this unfortunate condition. I don't see that that, however, is pertinent in this inquiry.

Q. Well, it is just as pertinent on cross examination as it is on direct, isn't it?

A. Oh, certainly; certainly.

Q. Now when you examined these lands in your various trips in the grant that you describe were you looking to see how much of it could be settled upon?

A. That was one of the things I looked at.

Q. Why did you want to ascertain that?

A. Why, I didn't go for any such special purpose. I went taking a general look over the grant, to see the character of the land, the timber or whatever there was on it. That is only one element in the calculation.

Q. Now you say you went through the Cascades; at what point?

A. We crossed below here, came out about Hood River.

Q. Any other point?

A. No; we crossed over here and came out at Hood River.

Q. Is that the only place you ever crossed the Cascades?

A. Oh, no; I have crossed the Cascades below.

Q. Where?

A. Klamath County.

Q. So that Multnomah and Klamath Counties were the only two places you ever crossed the Cascades?

A. I think so.

Q. Well, that gave you no personal information as to the land between, of course?

A. Oh, no; I haven't testified to anything else.

Q. Well, I didn't know just where you crossed; it wasn't brought out in your direct examination.

A. Well, I understood that it was brought out and

that I testified as not having been in the district around the center of the grant or around east of Eugene, or in any of that country, and it is true.

Q. You say you have never been in the western part of the grant?

A. I have never been in the west side of the grant at all.

Q. You don't know anything of the character of the Coast Range from personal observation, except such as may be——

A. (Interrupting) Except at the boundary of the state on the California side. I know that very well.

Q. But you don't know the character of the Coast Range?

A. North of that point?

Q. North of that point.

A. No.

Q. You do not know that in many places you can find land under cultivation clear to the top of the Coast Range, do you?

A. No, I do not, not on these grant lands. It has never been so reported to me, at least.

Q. Now in making up your statements and in forming your estimate as to the character of this land you have relied considerably upon the reports made to you by these cruisers that you have referred to?

A. Yes, sir.

Q. Including Mr. Britt and Mr. Elliott you mentioned in your direct?

A. Yes.

Q. You relied upon their statements, did you?

A. I did, also on Rees's statement.

Q. Well now, did you really trust Britt's judgment in those matters?

A. Oh, I trusted Britt's judgment in a great many matters; no reason why I shouldn't.

Q. Well, weren't there some matters in which you didn't trust his judgment?

A. His judgment?

Q. Yes.

A. What do you refer to?

Q. Well, wasn't Britt one of the fellows that you thought was interested in that sale to John F. Kelly, Trustee?

A. I believe he was.

Q. And you thought that was dishonest on his part, didn't you?

A. I don't believe any man can serve two interests, the buyer and the seller, at the same time.

Q. That is what I mean.

A. Well, that is what I mean.

Q. Now as I recollect it, his interest there was in the name of his wife or some relative, wasn't it?

A. My recollection is that it was; I was so informed.

Q. Well, after having learned that he was guilty of a double dealing of that sort, did you still trust his reports as to other matters that came to your attention?

A. I think Mr. Britt was out of the service about that time, but later I have had talks with Mr. Britt and he is a man who has had a very wide experience here, and as to his testimony as to the character of lands, that does not attempt to fix a value, but as to character of lands I could not understand and I don't understand why his statement should not be taken.

Q. Now you explain this letter that you wrote August 16, 1905, addressed to Mr. Dunne, as having reference to certain conversations that you had had with Mr. Pinchot?

A. Why, a part of the letter refers to that.

Q. Well, I mean the part referring to the change in the attitude of the officers of the Government.

A. Yes, sir.

Q. Now you say Mr. Pinchot came to you what time?

A. Some time in that year prior to that time, he was in San Francisco, as I remember it, and made that proposal to me, and he afterwards covered it by letter.

Q. Now this proposal, stripping it of the embellishments with which he might have adorned it, was a simple

proposition that the Railroad Company should give the Government a large tract of land, approximately four hundred thousand acres, I think you said?

A. I didn't say four hundred thousand; I don't know; but it was as I recollect it all the land—

Q. (Interrupting) In the Cascade Mountain Reserve?

A. In the Cascade Forest Reserve, lying in the eastern part of Jackson and in Klamath counties, the western part of Klamath.

Q. And that the only consideration that the Railroad Company was to get was the privilege of cutting off the timber under such rules and regulations as the Forestry Service might establish?

A. That is what I remember of it.

Q. Well now, did that appear to you to indicate that that was a friendly act?

A. Well, I don't know. I had the feeling all the time that it was the steel hand in the velvet glove; is that it? We were so much in the bad books of the Government at that time I thought Mr. Pinchot thought we would be willing to do most anything.

Q. Well then, it wasn't so much that you thought that he was friendly with you as it was that he was taking advantage of the situation?

A. Well, what I did think was that the attitude having changed to such an extent that a representative of the administration would come asking something in

the form of a favor, whatever you might think about the ultimate outcome of it, was such a remarkable change that if we wanted to get our transfer of that grant recognized, recognized within a reasonable time, why that was the time to do it.

Q. Why, you hadn't any idea of complying with his request, did you?

A. I had none; no.

Q. Nor any other officer of the Railroad Company, so far as you know?

A. I don't believe so.

Q. Your idea was to string him along until you could get what you wanted and then turn him down; is that it?

A. Oh, no, no, no; not at all; because the matter was simply pending at that time and this other matter was pending at that time, and it was not a question of stringing anybody because the Government of the United States had a right to make any such suggestion or proposition and have it considered.

Q. But you have no further explanation to make as to why you considered that an evidence of friendship on the part of the officials of the Government?

A. Not at all, excepting the attitude, as I say, both of that and the Reclamation Service, all wanting something and wanting to apparently be friendly.

Q. Now you remember of writing the letter of August 11, 1905, to Mr. D. A. Chambers that has been

introduced in evidence, don't you?

A. Yes.

Q. Now if you didn't have in mind a transfer of the Oregon and California Railroad grant why did you use this language: "I merely wish to explain that what I wish to know is what is the practice regarding transfers of grants made by Congress for railroad purposes, such as Southern Pacific, Oregon and California," and so forth?

A. Such as what?

Q. Southern Pacific, Oregon and California, and so forth?

A. Oh; Oregon and California has no significance there. I might just as well have said Central Pacific. That just came in my head.

Q. Now can you explain why throughout this correspondence, including your letter to Mr. Dunne, there is not the slightest reference to the transaction to which it relates?

A. Why, there were so many letters that passed in regard to that same thing. That is simply a coincidence. There was no intention at all to leave out anything. And another thing, while I think of it, you called attention to the fact that I have cited as an example the Southern Pacific Railroad Company grants and the Oregon and California Railroad grants is that they are the particular grants which we dealt with that have an indemnity provision, and that was the great thing that was the stumb-

ling block in that case.

Q. Well, I know, but now if you were simply inquiring with reference to the Southern Pacific grant why didn't you say so, say that you wanted to know what would be the practice under the Act of July 27th, 1866, granting lands to the Southern Pacific Railroad Company?

A. Why, probably because it didn't occur to me to do so.

Q. You knew that the Interior Department had held that some grants were assignable and that others were not?

A. I did not, or I would not have taken the trouble to have Chambers look the matter up. You see, I am not an attorney, and there are a lot of things I don't know and I depend on attorneys to find out for me.

Q. Well, do you consider that in asking an attorney a question as to whether the Southern Pacific Railroad grant in California could be assigned and the assignee could exercise the right of indemnity selection could be intelligently presented to an attorney without calling his attention to the grant that you had in mind?

A. My dear sir, as I have said there are a number of letters that preceded and also followed that particular letter. That letter possibly had some ear mark on it at the top of it as to subject that would disclose that; whether that copy shows it I don't know.

Q. This letter shows, Mr. Eberlein, that it is the

first communication from yourself to Mr. Chambers upon the subject, because it starts out and says, "I found it necessary to wire you today as follows."

A. Yes.

Q. Then quotes the telegram, and then you follow on and explain to him why you had to send it. It shows upon the face it is the first communication.

A. Yes. Well, what is the matter with the letter?

Q. What I am asking you is, why, if it referred only to the Southern Pacific Railroad grant you didn't mention it in any of this correspondence?

A. It is not necessary in that case at all. I was asking for an opinion as to a principle, and if the Government of the United States had in other cases accepted an assignee of a congressional grant that is what I wanted to know and it didn't make any difference to me what name you put on it. As far as that objection goes I consider that entirely immaterial. But I will say here, if that is what you want to know, that if you think that there is anything in that correspondence that even obliquely refers to this Oregon and California grant I can tell you emphatically no, it does not. The idea of transferring the Oregon and California grant to a land company was never sprung that I know of.

Q. Have you any way of explaining how or why that correspondence was filed in the Oregon and California Railroad file?

A. I can't tell you. That might be the blunder of

a clerk. It may not have been Oregon and California file; I don't know that it was.

A. I can testify as to the filing system before the fire, and that is what governs here.

Mr. Townsend: Wasn't there a separate filing system for the Oregon and California correspondence?

A. No, sir. We kept them filed, as I recollect it, by a system which—we didn't keep them in that shape; I will tell you that right now. That is something that wasn't saved from the fire, which you have in your hand.

Mr. Fenton: The box, you mean?

A. No; the box wasn't saved from the fire.

Mr. Fenton: That is the letter file?

A. No, no; the case wasn't filed; or that wasn't the way they filed letters. Now, what you have there, gentlemen, is the results of this tax investigation in Oregon, which happened to be saved and thrown into that box. But those boxes never were in the fire, which can be seen. You could not scorch part of those contents and not scorch the outside.

Q. Now you say that when the Government was installing the Klamath Irrigation project that the Railroad Company, referring, I assume, to the Southern Pacific, did everything it could to get the states of Oregon and California to consent to either the raising or the lowering of the level of those intra-state lakes, or securing legislation which granted to the Federal Gov-

ernment the title to the bed of the lake.

A. Those series of lakes, naming them in the acts.

Q. Now what did the Railroad Company do to induce the states to pass those bills?

A. I don't know what steps were taken. I only know that I was importuned to get Mr. Harriman interested so that the matter might be taken up in these two legislatures and passed. The time was getting short and what steps were taken here I don't know because I wasn't present in the state. I was in the East at the time.

Q. Well, you have testified, however, that the Railroad Company had sufficient influence to get those bills through the legislatures of the two states?

A. Did I? They may have had; I don't know; but I wasn't present in the state and I only know the fact that the bills passed in the time that the Government desired.

Q. You say here, "It finally resulted in the passage of acts by both California and Oregon?

A. Yes, sir.

Q. Granting the rights of the states to the United States?

A. We did everything we could to assist them at that time and it was to the work done by the Railroad Company that they owe the success in that matter wholly."

A. Well, I will stand by it. I believe it is true.

Q. Now, Mr. Eberlein, you say that the Booth-Kelly people started this agitation in 1906 and that it spread quite rapidly until about August that the public agitation was so great that you took cognizance of it in some way, it was brought to your attention in some way. That is the general substance of your former testimony. Hadn't there been considerable agitation before that time?

A. Why, not that character of agitation; not demands. What I referred to was the proceedings and resolutions by different commercial bodies, of which they always favored me with a copy and a pretty stiff letter. That was the first time there was any organized movement that I know of.

Q. You had been anticipating that for sometime, hadn't you?

A. That there would be trouble over that?

Q. Yes.

A. Oh, I think that signs pointed that way.

Q. As a matter of fact, when you first came out here you read the granting acts and discovered this provision, which is the general basis of this present litigation, didn't you?

A. Why, I read the granting acts but as to that clause that you mention I was informed at the time that that was not considered operative, and I will take this opportunity of changing my very unfortunate remark

that I made there a while ago without any reference at all that could be offensive to any one in regard to the opinions of attorneys. I sincerely regret the remark that might be construed in a way that I had no intention at all. What I had reference to was that I was informed and believed that up to the time that I came here that these titles had passed muster with attorneys and that it was the consensus of legal opinion here on the Coast and in Oregon that the language did not operate to cloud the title to these lands.

Q. But, I say, you learned of the provision in the grant, without calling now for any testimony as to what you were advised with reference to its validity?

A. Oh, I read the act, yes. I believe there is some such language in the Union Pacific grant, but I don't remember as to that exactly.

Q. No; it is entirely different in the Union Pacific grant.

A. The same question was brought out in the old Crowe resolution at one time I remember down there.

Q. But I want to get at the question now of the responsibility of the Booth-Kelly Lumber Company for this agitation. As a matter of fact, were you not looking for agitation and wouldn't there have been the same agitation if the Booth-Kelly Lumber Company had never been in existence?

A. I don't believe there would. Possibly. You can't tell what might have come about. But a concerted action of this kind has to have promotion by some in-

dividual or individuals that have power and have standing in their districts, and it originated at Eugene, and as I say I am informed and believe that R. A. Booth was chairman of the first meeting that was called to protest.

Q. The matter was under discussion and consideration, however, by yourself and other officers of the Company prior to 1906, was it not?

A. I don't think it was under any serious discussion at any time. I have one recollection of having made an inquiry in regard to some case or other in which that was spoken of. I remember particularly of taking notice of a suit or an effort made by so-called bona fide purchasers who attempted to acquire the lands of the Elijah Smith grant in that way, and I took the matter up then and suggested—

Mr. Fenton (interrupting): You refer to the Southern Oregon Company's grant?

A. Yes, sir, the Southern Oregon Company. I suggested at that time that if those clauses were identical with these in the Oregon and California grant, that any adjudication there would undoubtedly affect us.

Q. Well now, if the Booth-Kelly Company was responsible for initiating this agitation, why, in your letter of February 20th, 1904, addressed to Judge Cornish, did you use these words: "I hand you copy of letter written to Mr. Herrin on the subject of the two dollar and fifty cent limitation sales to actual settlers in the grant to the Oregon and California Railroad Com-

pany. The matter is going to come to a head without any action on our part. I enclose copy of the printed reports on the subject. I have advice from Oregon that there is considerable excitement and undoubtedly we shall be obliged to defend ourselves vigorously. I wired Mr. Andrews as per copy enclosed to keep to work"—I think that should be at work, probably a clerical error—"vigorously with his defaulted contracts so as to save us as much trouble as possible."

A. I am familiar with the letter. Now what is that question? What did I mean by it?

Q. I say if the agitation was started by the Booth-Kelly Company why did you write him in 1904, two years before, that you were advised that there was considerable excitement in Oregon then upon the subject and you should undoubtedly be obliged to defend yourselves vigorously?

A. Because that was the only thing that a business man of reasonable intelligence could infer from what was transpiring. That had reference, I believe, to this action I have just testified to in reference to the Southern Oregon Company.

Q. Oh, yes; the correspondence shows that.

A. Well now, that is what I meant, and I think it is easily inferable that if those people had a like clause in their grant that undoubtedly the whole thing would spread. It did not, though, at that time, and the peculiar circumstance in all this is that this business, so far as the Oregon and California Railroad Company is concerned,

became acute only after the fire. Then it came to a head with surprising rapidity when we were entirely helpless to proceed.

Q. Now Mr. Eberlein, I want you when you return to San Francisco to consult such records of the office of Mr. McAllister as you can and designate in a written statement the deeds or contracts to the Booth-Kelly Lumber Company which you contend—

A. (Interrupting) Are improvident?

Q. (Continuing) Were improvident and included special privileges extended to that Company, and address your communication to Miss Margaret A. Fleming, the Special Examiner before whom this testimony is being taken, at Postoffice Building in the City of Portland. Identify it by your signature so that she may extend it in the record as your complete answer to one of the questions which I asked you and which you were unable to answer from the material now before you.

A. I will be very, very glad to do so.

Mr. Fenton: Will the witness be good enough to furnish counsel for the Government and counsel for the defendant a copy of his letter for their files?

Witness: Yes, sir.

RE-DIRECT EXAMINATION.

Questions by Mr. Fenton:

You were asked about a reservation of a hundred thousand acres of timber lands of the Oregon and Cali-

fornia Railroad Company for railroad purposes; do you or do you not know whether or not the Union Pacific Railroad Company has a reservation of about forty thousand acres of timber land of its own which is likewise under reservation for railroad purposes?

A. You mean the Union Pacific?

Q. Yes.

A. No, I do not. I don't recall any reservation there.

Q. You don't remember?

A. No. Mr. McAllaster would be competent to testify about that.

Q. You don't know whether there is or is not?

A. No, sir, I do not.

Q. Now referring to the John F. Kelly, Trustee, contract which you regarded as improvident, and which you learned was a contract in which some twenty-five people were interested and for whom he was trustee, and in which you say some employes or officers of the company were interested, I wish you would state to the Court whether or not any of the officers of the Oregon and California Railroad Company, or whether or not any of the counsel for that Company or for the Southern Pacific Company, and particularly whether Mr. P. F. Dunne, Mr. William D. Fenton, Mr. William Singer, Jr., Mr. William F. Herrin, were in any wise interested in, connected with, or parties to, that contract, directly or indirectly?

A. No, sir, not that I am advised. The names of railroad men whom I identified on that contract were those employes of the Southern Pacific Company.

Q. Were they men of official responsibility, executive officers of the Company?

A. They were not in the first rank.

Q. Were they in any wise connected with the land department excepting Mr. Britt?

A. No, sir.

Q. Who was interested as a cruiser?

A. No, sir.

Q. And who had nothing to do with fixing the values?

A. With the traffic and operating departments were all.

Q. From whom did Judge Cornish take his directions as to any action for the Oregon and California Railroad Company?

A. Mr. Harriman, I understand.

Q. You were present at the meeting of the Irrigation Congress held at Sacramento in 1907, in September, which Mr. Harriman addressed?

A. I went there to hear the address.

Q. And did you hear it?

A. I did.

Q. Do you think that is reported officially in the

proceedings of that year of the Association?

A. I was not a delegate to that particular Congress, but I was officially connected with the National Irrigation Association at its annual meeting in Portland, and at that meeting and at all others that I have attended there was an official stenographer who took down verbatim all the addresses and the debate, I believe.

Q. Now you spoke about your idea of the sale of these timber lands which you suggested to your superiors when sales should be resumed of timber land, was to reserve in the contract of sale the products of the land. Do you mean that the Company making the sale should reserve in that contract, or was it your recommendation to reserve in that proposed contract anything else other than the products of the manufacture of the timber, or did it have application to grain and wheat?

A. Nothing whatever but the transport of the product of the timber in cases where it was shipped.

Q. This contract of reservation would be in the contract of sale, and was it your idea that such a reservation or covenant should be in the deed?

A. I understood—my advice was, that it would be necessary to include it in the deed.

Q. Yes. That was never adopted?

A. Never to my knowledge.

Q. Any reservation of that kind as to the transportation of the products, consisting of timber, by the South-

ern Pacific Company in this case, or the Oregon and California Railroad Company, if it should resume the operation of its road in its own name, you said would be at current rates. Do you not know that those rates, if unreasonable, would be fixed by the State Commissions of the State for local hauls or intra-state hauls, and by the Interstate Commerce Commission for interstate hauls?

A. Yes, sir.

Q. Whatever the agreement might be?

A. Yes, sir; certainly.

Q. You understood that, did you?

A. I understood that, and my idea was to include that provision so that it would be thoroughly understood.

RE-CROSS EXAMINATION.

Questions by Mr. Townsend:

In any of your experience in connection with this land grant, and by that I mean the two land grants involved in this suit, do you know of any instance where the purchaser of lands knew at the time of the purchase of this clause in the grant which in terms restricts the manner in which the granted lands might be sold?

A. I wasn't present at the time these sales were made.

Q. Well now, I am asking you if anything that came within your observation had any bearing upon that subject, to the end that I may send for the evidence if it

is in existence?

A. The only thing that I know of is talk with these different purchasers who came in and spoke of that.

Q. But that was after this agitation arose, was it not?

A. Oh, I think so; probably before in some cases, but always after the execution of the contract. I wasn't present at that time, and whatever of that kind came up was taken up afterward, and it is only from what these people have said that leads me to believe that they examined their title and believed that they were safe in getting it.

Q. That they had no knowledge of any defect of any kind?

A. Oh, they had knowledge. I know some of them evidently had knowledge. I mean the larger purchasers. The small purchasers, I haven't an idea that they ever knew of it at all or examined the title. They bought under an executory contract and they never saw an abstract.

Q. You don't know whether any of the large ones did at the time of the making of the sale, or not, but you do recall that some of them spoke of it afterwards?

A. They spoke of it afterwards in such a way that led me to believe that that matter was discussed and passed up.

Q. Now do you remember who discussed it with you?

A. Well, now, this is a hazy recollection. I can't swear positively, but I had a number of talks with Mr. A. B. Hammond, and it is in my mind, when you mention that, that he told me of that. He is the kind of a man who would examine his purchase pretty carefully, and I believe I have heard it mentioned, just when I don't know, that this matter was gone into by—

Q. (Interrupting) Mr. Linthicum?

A. Yes, for the Weyerhausers.

Q. No; for the Booth-Kelly.

A. Booth-Kelly?

Q. Yes.

A. Well, didn't they make—I have got it when they bought out Lindley that they made an examination of that.

Q. They may have done so at that time, too, for all I know.

A. Yes.

Q. With the exceptions that you have stated, you know of no specific instances of that kind?

A. I don't recall any; no.

Q. That is, that you recall now?

A. I don't recall them now.

RE-DIRECT EXAMINATION.

Questions by Mr. Fenton:

Out of the many hundreds of contracts in all nearly

eight thousand, you had no opportunity to talk with the vendees or with the grantees as to whether they knew at the time or before they bought the land as to what their knowledge was of these provisos in the acts of Congress of April 10, 1869, and May 4, 1870?

A. Oh, no; I never had any talks with them generally.

Q. What you mean to say is, then, that you never heard that question discussed by any of these purchasers or parties who had acquired the title until after this question was raised in the public prints and in these discussions?

A. Yes; that is what I intend to convey.

RE-CROSS EXAMINATION.

Questions by Mr. Townsend:

Just one more question on that subject. You found nothing in the records of the office before the fire indicating that any of the purchasers had discovered these provisions and objected to the title upon that ground?

A. No, I never saw a case of that kind.

Whereupon J. N. SHERBURNE, called as a witness on behalf of defendants, being first duly sworn, testified that he resides at San Francisco, California, and is head clerk of Government accounts of the Southern Pacific Company, and has been in the employ of that company and its predecessor since 1881. Its predecessor in the operation of the railroad from Roseville

Junction to the extension towards the California-Oregon state line, was the California and Oregon Railroad Company, and later the Central Pacific Railway Company, and he has been continuously in the department mentioned up to the present time. He had immediate charge of the preparation of Defendants Exhibit 288, purporting to be a "Statement of Government freight and passenger transportation over the free road between Portland, Oregon and Roseville Junction, California, for the years 1906 to 1910, inclusive, showing proportions accruing north and south of Oregon-California state line." This exhibit was prepared as to freight from the waybills, and the transportation of passengers from the ticket reports of the station agents.

Whereupon it was understood that all the evidence upon this subject should be received subject to the objection of the Government that it is incompetent, irrelevant and immaterial, and to the objection that the amount of service rendered by the Company in transportation of troops and property is no defense in this case; it being understood that no objection is made on account of not producing the original books of the company.

Whereupon witness further testified that the exhibit is a correct statement of the various amounts, and what it purports to show, as shown by the records of the company for that period. The records of these accounts in San Francisco prior to April 18, 1906 were destroyed by fire. He was familiar with these accounts previous to that time, that is, from 1882 down to 1906. The vol-

ume of business of this kind in the movement of Government freight and passengers over the road from Portland, Oregon, to Roseville Junction, California, from 1882 up to the year 1906, was approximately the same by years as shown in Defendants' Exhibit 288, as he remembers, with the exception of the period of the Spanish-American War in 1898, when it was heavier by reason of a great many regiments coming through Portland to San Francisco. He recalls at that time several of these regiments, some of the northern regiments, intended for the Philippines and destined for Manila were moved by the company from Portland to Roseville Junction and then to San Francisco. He recalls particularly Idaho and South Dakota and Minnesota. With the exception of the special occasion of 1898, known as the War with Spain, the movement of Government freight and passengers was approximately the same from the time the road opened, as shown in Defendants' Exhibit 288.

Defendants' Exhibit 336 is Department Circular No. 62 of date October 29, 1907, as issued by the Comptroller of the United States Treasury, different departments, with a view of having a uniform bill of lading on transportation, requested to cover movements of troops and property of the United States, and is furnished by the United States and the Treasury Department for use by this company and other companies in the transportation of Government employes and property.

Whereupon defendants offered and there was received in evidence, Defendants' Exhibit 336 which is hereinafter set out and described and made a part of this state-

ment of the evidence and identified as such.

Whereupon witness further testified that Defendants Exhibit 337 is Circular No. 16, Quartermaster General's Office, of date July 1, 1912, and is entitled "Schedule of Land-Grant and Bond-Aided Railroads of the United States and Instructions concerning Settlement of Accounts over such roads, with a Compendium of United States Laws showing the Conditions of the Grants or Subsidies," and has a map in the back of same, and was issued by the Quartermaster's Department of the United States Army, as a guide to the Railroad Company performing the transportation, the manner in which the bills are to be rendered for charges, and also as a guide to the settling or disbursing officers of the Government as to the settlement of such bills. There is at page 42 of this Circular the following:

No. 58.—Southern Pacific Company. From Roseville Junction, California, to East Portland, Oregon, under the column Statute, Volume and Page, these entries—July 25, 1866. 14—239; June 25, 1868, 15—8; April 10, 1869, 16—47, and opposite thereto these words: "And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit dispatches by said telegraph line for the Government of the United States, when required so to do by any department thereof, and that the Government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reason-

able rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States.—Act of July 25, 1866, Section 5."

This is the Act or section of the Act under which this service of which he has been speaking, has been performed by the Southern Pacific Company and its predecessors, since the construction of the road and since his knowledge of the same in 1882. The free service furnished by the company and represented by Defendants' Exhibit 288, is the free service referred to in the Act. The object of keeping a record of the amount of that free service is for statistical purposes. There is no stated period for the issuance of these circulars. Circular No. 16 is practically a reissue of Circular No. 13 issued June 1, 1912, and Circular No. 16 is the one under which the Government and the company are now doing business.

Whereupon defendants offered and there was received in evidence Circular No. 16, marked "Defendants' Exhibit 337," which is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Circular No. 16 practically supercedes General Orders No. 41 from the War Department of date February 28, 1907, entitled "Regulations governing the military transportation over land grant and bonded railroads and the settlement of accounts for such service, with a compendium of United States laws showing the condition of the grants or subsidies, with map and other data, somewhat similar to the Circular No. 16, identified as Defendants' Exhibit 337, and containing at page 42, under No. 50, this entry: "Southern Pacific Company, San Francisco and Portland lines, from junction with Central Pacific Railroad to northern boundary of California," giving then the dates of the statutes and the section 5 of the Act of July 25, 1866, the same as set out in Circular No. 16, and which General Order No. 41 appears to be issued by order of the Secretary of War, J. Franklin Bell, Major-General Chief of Staff.

Defendants' Exhibit 338 is a complete set of forms of requisition made by the United States under this Act of Congress, upon the railroad operating the line from Roseville Junction, California, to Portland, Oregon, and they are known as a Quartermaster's Department United States Army bill of lading, requesting the transportation of property of the United States in three sections; the first the bill of lading proper, the second, a memorandum bill of lading, the third the shipping order. Also a Government Request for Transportation of passengers, Quartermaster's Department Form No. 17. This is only a copy of the form that is used as a requisition for passenger transportation. It is not

valid until it is filled out by the proper officers, and is identical with that used for transportation, but has on it the words in red ink "Copy not valid transportation request." The transportation request is issued by an officer of the army requesting certain transportation of a railroad company, the document being filled out. showing the number of passengers to be transported, and between what points. That document is surrendered to the company's agent, and transportation is furnished, either tickets, or a ticket covering the number called for by the document, the agent accepting the transportation request in lieu of cash. The request is then sent to the general office by the agent, to cover tickets issued by him, and the general office uses that as a bill against the Government for the service. If it is a free service, it is carried on the books of the company without charge to the United States and no bill presented. The three blanks relating to shipment of goods of property, are filled out or issued by a shipping officer, stating the commodity and points between which it is to be carried. That is also surrendered to the company, and used by the company to bill against the Government for such services, and if it is free service it is held in the records of the company and not surrendered to the Government, which is not presented with a bill. If the United States desires to ship a regiment from St. Paul to San Francisco, going partly over bond-aided or land-grant roads, over which the United States is entitled to free transportation, and it is routed in part over non-aided railroads, intermediate or connecting, and reaches Portland over a non-

aided road, or a road over which the Government is not entitled to free transportation, the shipment or movement of a regiment, and a like movement of Government property under this statute, receives free transportation over the road from Portland to Roseville Junction, and if the movement is destined over the non-aided road from Roseville Junction to San Francisco, that is charged against the Government and bill presented, and that part is paid by the Government; possibly not for the full amount which the company would charge for that service, but the Government makes a cash payment; that is, if the Government asks for service over a portion of the mileage that is bond-aided, over which it is entitled to free transportation, and it is a through movement over a part of a line that is connected therewith, that is entitled to charge for and be paid. The traffic offered by the Government at any point in the United States moves over this segment or portion of the bond-aided line, and also over that portion which is free, and it does not make any difference where the traffic originated, or over what roads it comes, if it is Government traffic, entitled to move free over a bond-aided or land-grant road over a portion of that haul, it is carried free. The business does not have to originate at Roseville Junction on the one hand, or at Portland on the other in order to entitle it to free movement.

Whereupon defendants offered and their was received in evidence these four documents marked "Defendants' Exhibit 338," which is hereinafter set out and described and made a part of this statement of the evi-

dence and identified as such.

Whereupon witness further testified that the United States is making these requests continually and has been up to this date, and the company is furnishing under the Act of Congress all transportation requested by the Government.

Whereupon witness, on cross examination, further testified that this transportation commenced in 1887, he believes, when connections were made between the California and Oregon and Oregon and California Railroads. There were a few military posts along the uncompleted portions of the roads prior to the completion of the continuous lines. The company used to have business as far north as Redding on the original California and Oregon Railroad running from Roseville Junction north, and there were a few shipments of property for the Weather Bureau and Signal Service, but the volume of business did not reach the company until the road was opened in the middle of December, 1887. The company commenced to keep an account of the amount of this traffic furnished the Government from the time the service was performed. It was in vogue when he took charge of the work, so that it was kept by his predecessor, but he has no personal knowledge of the time the company did commence to keep a record. He does not know anything about how to compute the amount of traffic of this character that the Government may have lost by reason of the delay in completing the construction of the railroad in accordance with the terms of the granting Act, and it would be difficult to make a computation of that

kind. It is the rule of the company that a record be kept of all transportation, whatever its nature, not only the Government transportation, but commercial, and this is the reason for keeping these records for statistical purposes. They keep a record of the amount paid by the Government for the transportation of mails, and that amounts to a considerable sum each year, on the road from Roseville Junction to Portland. The company is paid for that service on rates made by Congress, based on weight, but he does not recall the amount. He thinks this transportation account is greater than the mail account.

Whereupon, on redirect examination, witness further testified that he became an employe of the Central Pacific Railway Company in 1881, and at that time the Central Pacific Railway Company was operating the line from Roseville Junction towards the north as far as completed, and the Oregon and California Railroad Company operated the road from Portland to Ashland prior to 1887, and was operating the road, as he recollects, from 1882 down as far south as it was completed. He does not mean to say that the first free transportation under this Act of July 25, 1866, began in 1887, when the road was completed through. The company handled or had free transportation, to his knowledge, since 1882, when he went to work on that particular class, that is, as far north as the road was opened, but he knows nothing of that traffic from Portland as far south as it was opened. He had nothing to do with the Oregon and California Railroad Company. The Southern Pacific

Company was not incorporated until 1884, after the Central Pacific Railway Company was incorporated. He has no knowledge whatever of how much business of this kind was moved from 1869 up to completion in 1887 on the Oregon and California Railroad Company. Fort Vancouver is situated six miles from Portland, and Vancouver Barracks are on the Columbia River, and they have been there for a great many years.

Whereupon, on recross examination, witness further testified that it is his understanding there was a post at Vancouver before there was any railroad in there. Vancouver is on the Northern Pacific Railroad Company line. He remembers that the Northern Pacific was completed by Villard before he failed in December, 1883. While the Northern Pacific is a land-grant road, it is not under obligation to furnish free transportation. It is what is called a fifty per cent line, that is, in accepting the grant of lands, the company conceded the right of Congress to make such rates as Congress saw fit, and Congress has seen fit to cut the rate to fifty per cent.

Whereupon it was stipulated that J. A. Ormondy, Chief Clerk of John M. Scott, General Passenger Agent of the Southern Pacific Company Lines in Oregon, would testify substantially the same as J. N. Sherburne on the subject matter of inquiry, other than as to the volume of business with which the witness is not familiar.

Whereupon, F. W. SERCOMBE, a witness called on behalf of defendants, being first duly sworn, testified that he resides at East Orange, New Jersey; is an ac-

countant, and was in the office of the auditor at San Francisco, California, on September 20, 1905, and prior thereto, up to as late as January 4, 1906. His superior or chief officer, part of the time was George Klink, who was the auditor of the Southern Pacific Company and subsequently Charles B. Seger. These statements, Defendants' Exhibit 320, consisting of "Statement No. 1, showing by counties the assessment upon Congressional lands of the Oregon and California Railroad Company from 1891 to 1904, inclusive," and "Statement No. 1-A, showing by Counties the assessment upon Congressional lands of the Oregon and California Railroad Company from 1891 to 1904, inclusive," the first statement bearing date September 20, 1905, the second statement being dated January 4, 1906, were prepared under his direct supervision and instruction, in San Francisco, at the time specified and mentioned on these respective statements. The signature in the lower left hand corner of Statement No. 1 is his signature, and indicates that, to the best of his knowledge and belief, the statements are correct. The facts purporting to be stated, for instance, in the column as to "Taxes Paid" for each year, were obtained from the tax receipts of the company in the auditor's office, showing taxes paid on these lands. These compilations or computations showing average assessed valuation per acre, and average tax paid per acre, were made under his direction. It is his recollection that the figures showing the total acreage in columns, for the various counties, were obtained by him from the tax receipts and added up, and these state-

ments, computations and figures are correct, based upon the tax receipts and the records of the company examined by him at the time. His recollection is that these documents were prepared at the request of the office in Portland.

Whereupon, on cross examination, witness further testified that at the time these statements were made, Charles B. Seger was auditor. Seger did not sign these statements for the reason that he had recently come from Texas and was not thoroughly acquainted with the organization, and for the further reason that witness was in charge of the general accounts of the Southern Pacific Company, which included the so-called land accounts. He supervised the preparation of these statements to the extent of indicating to the clerks, precisely what kind of a statement he desired prepared, the documents from which this information should be compiled, and the manner in which it should be finally turned over to him, for transmission to the person requesting the information. He was asked for certain information and then issued instructions or directions to his clerks to prepare these statements accordingly. He supervised the preparation of the statements. He would check the work against the records of the company, the ledgers of the company, to see that the total taxes paid would agree with the aggregate of the statement, and it is his recollection that he would and did apply this check to the work to see whether the total amount corresponded with the ledger account.

Q. Well, now, for illustration, I call your attention

to Statement No. 1-A, referring to Tillamook County for the year 1902. I see that it states here the acres assessed to be 60,261.39; assessed valuation $148,420; average assessed valuation per acre $2.50. It shows right on the face of it that it is not correct. Did you notice that?

A. In what way is it not correct?

Q. Well, there is only one way in which it could not be correct; that is by being incorrect.

A. That the division of the acreage into the assessed valuation does not equal $2.50?

Q. Yes.

A. Well, I would have to verify that before I could say it is not correct.

Q. Well, you could see that 60,000 acres at $2.50 would be $150,000. It is more than 60,000 acres, and the total assessed valuation is $148,420, and the average is stated there to be exactly $2.50 an acre. Did you pay any attention to those things to say whether that is correct or not?

A. Not these deductions. They were made mentally or by pencil by the clerk preparing them. Those two columns, though, were from the original tax receipts. A clerk is liable to make a mistake there in carrying out those particular extensions; that information being prepared principally for the person who requested it as to the average assessment and average tax per acre, and in no way affecting the acreage or the taxes paid.

Q. Well, you did not purposely have those made incorrect, did you?

A. Oh, no; no.

Q. There is no reason why it should not have been made correct, is there?

A. No reason at all. There may be a clerical error in making that computation anywhere in the statement.

Q. I also observe here Washington County for the year 1892; acres assessed 22.748; assessed valuation $22,915, showing average assessed valuation more than $1.00 an acre, although it is stated here to be 58 cents.

A. Yes.

Q. Have you any way to account for that?

A. The same thing applies. It may also be accounted for by a typographical error in the stenographer copying the figures.

Q. The statement shows on page 1, if I understand it correctly, average of 2 cents and 7 mills tax paid per acre per year for the years 1891 to 1904, inclusive. Is that correct?

A. Yes, 2 cents and 7 mills.

Q. So that the total tax paid during those fourteen years average per acre is 37 cents and 8 mills, or fourteen times 2 cents and 7 mills?

A. Yes, that is the average.

Q. And, if I understand you correctly, these statements are based entirely upon your ledger account show-

ing tax account, taxes paid, and the receipts received each year from the local county officers?

A. County officer, whoever he was, yes.

Whereupon, on redirect examination, witness further testified that he is now employed in the office of the comtroller of the Southern Pacific Company at New York, Mr. Mahl, and has been continuously in the employ of the Southern Pacific Company during the times with reference to which he has testified. At the time these tables were prepared he was in San Francisco; he left San Francisco after the fire of April 18, 1906.

Whereupon, A. N. HOFFMAN called as a witness on behalf of defendants, being first duly sworn testified, that he is clerk in the Land Department of the Southern Pacific Company and has been in the employ of the Company two and a half years as clerk, on the records in the office and examining records in the United States District Land Offices. His work in United States Land Offices has been abstracting entries that bear adversely to the Company in different land offices in California, Nevada and Roseburg, Oregon. He has made an examination of the land in the Roseburg land office for the purpose of ascertaining the acreage of public lands not entered within the limits of the grant of July 25, 1866 and May 4, 1870. Although he did not enter all the work on the map, he checked it back with reference to the map. He verified "Defendants' Exhibit 339" in his examination of the public records of the Local Land Office of the United States at Roseburg. The red squares

on this exhibit show the vacant public land as to the even numbered sections within the limits of the grant. These red squares circled with green show the land within the forest reserves, the limits of forest reserves, and those with other circles show lands withdrawn for power sites, Fisheries Bureau and Indian Reservations. The memorandum with this map showing the estimated acreage of public lands in the Portland and Roseburg, Oregon, Land Districts of 1,012,960 acres within the limits of these grants as public lands not entered in the counties of Multnomah, Washington, Tillamook, Yamhill, Polk, Clackamas, Marion, Lincoln, Benton, Linn, Lane, Coos, Curry, Douglas, Josephine, Jackson, and Klamath, is, so far as these counties lie within the United States Roseburg Land Office District, correct on an estimated basis. In making the investigation, he worked from the tract books and from the plats in the District Land Office and those that showed vacant, he marked upon some smaller plats, that he had, and used that data from original search of the public records and transferred it to Defendants' Exhibit 339 which is correct according to the search which he made. Mr. Wall, he believes, assisted in the preparation of this data on this map and statement with reference to the lands situated in the Portland United States Land Office District and he and Wall worked together in connection with the preparation of this map. Wall did the work in the office and witness transferred Wall's work on to this map; that is to say, Wall did the work in the Local Portland United States Land Office, searching the records there for the data

and furnished him with data, and witness transferred it to this map in connection with the work that witness had personally done in the Roseburg office. These two districts covered all those counties mentioned in this list and a little more, he believes, up north. The table covers all of the vacant lands within the limits of the grant in these two land districts.

Whereupon defendants offered and there were received in evidence these Exhibits marked "Defendants' Exhibit 339" and "Defendants' Exhibit 340" to which complainant objected as immaterial.

Whereupon it was stipulated that the Wall referred to by the witness would, if called, testify as to said exhibits the same as witness Hoffman and that the testimony of the two witnesses would cover both exhibits, excepting that the testimony of Wall would relate to the land situated in the United States Land Office Portland District, which exhibits are hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon L. F. STEEL, recalled as a witness for defendants, further testified that he had custody of the corporate records of the Oregon and California Railroad Company under W. W. Cotton, Secretary of that Company up to January 15, 1912, when Cotton resigned and his successor was elected. He has prepared a summary showing the stockholders, number of shares, the date of the election of directors, president, vice-president and secretary from the earliest period of the Oregon and

California Railroad Company down to January 15, 1912 and "Defendants' Exhibit 341" is the statement prepared by him from the records of the Company and is a correct summary of the facts as shown by the corporate records of the Company and was prepared at the request of Mr. Townsend, representing the United States in this suit.

Whereupon defendants offered and there was received in evidence "Defendants' Exhibit 341" which is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon JOSEPH GASTON, recalled as a witness on behalf of defendants testified that he is acquainted with the work which the Oregon Central Railroad Company East Side, known as the Salem Company, did by way of construction, grading etc. of its railroad from East Portland south in 1868 and prior to April 1869. They were in a contest with the Salem Company with respect to the land grant made by Congress in aid of the construction of the railroad from Portland to the California line and it was the interest and purpose of himself and associates to delay the East Side or Salem Company in every way they possibly could so as to exhaust their resources and prevent them from being in a position to have any claims or chance to get the land grant for their Company. In this work of opposing them, he and his associates, incited opposition among the land owners to give them the right of way or asking exhorbitant prices for the right of way and they pre-

vented them in every possible way they could, from getting labor, and did all they could to break down their credit and stir up law suits against them about their right of way. For the purpose of ascertaining the amount of actual construction work and the extent of the grading and other construction work between East Portland and Salem, he went over the line once with the superintendent of construction of the Oregon Central Railroad, or as it was called then the West Side. Afterwards this superintendent M. S. Hart went over the East Side line several times as many as three times, he thinks, to ascertain how much work the East Side Company had done and where it was and what sort of work it was and what probably were the expense in doing this work, his object being to ascertain the resources and to exhaust them, if they could. Prior to February 1, 1869 and during 1868, including January, 1869, as nearly as he could estimate it, there was work done all the way along the line of the Oregon Central of Salem, East Side, from East Portland to within five miles of the City of Salem. He thinks there was one patch of work on the south side of Lake Labish, and it was in places all along, owing to the disposition of farmers to give right of way and the facility for making a showing of work done, and his associates had Mr. Hart, the superintendent of the West Side Company make an estimate on his last trip, as to the amount of what Hart thought the whole amount of money the East Side Company had expended, that is suposing that they had paid for it all and Mr. Hart put the amount at $150,000.

Hart's estimate was made in February 1869, and he thinks that Hart's estimate was reasonable. He and his associates and everybody else knew that the East Side Company was not connecting up its work, that it would not count on the first 20 miles of railroad but was work that would count in the construction of the line.

Whereupon the witness further testified as follows:

"Q. Do you know anything about the pay-roll set out at page 130 of the printed record in the case of Holladay v. Elliott, which purports to show a correct footing of the pay-rolls and number of men employed on the Oregon Central (East Side), commencing with September, 1868, down to and including January, 1869, and for the period up to September 12, 1868, which foots up, according to this table, $49,113 from September, 1868, to and including January, 1869, and $81,455.31 prior to September 12, 1868, giving it by months, the number of men employed in each month, and the rate per month excepting that prior to September 12, 1868, which is given in a lump sum and referred to in Mr. Elliott's testimony as $81,455.31 in that case; and all aggregating $130,568.31, money disbursed on pay-roll account for construction? Have you any knowledge of that, or as to whether that is fairly accurate?

A. I think these old pay-rolls were submitted to me in some litigation between Holladay and Elliott, or John Nightingale and Elliott—I could not be certain which; but the pay-rolls were submitted to me as to my opinion of their reasonableness or honesty, and anything else I

might choose to say about them. I could not identify them now, but if they are the same payrolls, my opinion at the time was that Elliott had spent the money that he claimed he had.

Whereupon on cross examination witness further testified that there was no construction work prior to April 16, 1868 by either the East Side or West Side Companies. They commenced about that date, the West Side Company on one day and the East Side Company on the next day. The East Side Company projected its line on the East Side of the River where for the most part the expense of grading was much less than the expense of grading the line on the West Side road during the first few miles.

Q. Mr. Holladay and his associates spent a great deal of money in that political fight, did they not?

A. Yes, I think they did.

Mr. Fenton: Objected to as immaterial, and as not cross-examination.

A. Holladay admitted to me he had spent considerable money.

Mr. Fenton: It already has been testified to in direct by this witness called for the Government.

Q. And do you not remember, Mr. Gaston, that after the fight was taken into the Legislature and Holladay finally won out and got his resolution of October 20, 1868, adopted and approved by the Governor, that both sides then went to Washington to fight the next

battle there, which finally resulted in the act of April 10, 1869?

Mr. Fenton: Objected to as not cross-examination, and as incompetent, and as impossible for the witness to state what caused the act of April 10, 1869.

Q. You remember that?

A. I remember that both parties sent agents to Washington. Mr. Simeon G. Reed went on behalf of the West Side Company; and John H. Mitchell and Stephen F. Chadwick—I think that Mitchell went first, and that Chadwick joined him afterwards, or he was in Washington, and he helped in the fight there—helped Mitchell.

Q. Didn't Mr. Holladay himself go East?

A. I think he was—I think he was in the East; whether he was at Washington or not, I don't know.

Q. Well, now, isn't it a fact that after that resolution of October 20, 1868, was passed by the Legislature of Oregon both sides suspended construction until the fight in Congress had been disposed of?

A. Well, not immediately. I know that we kept our forces at work for a while, and I think they did theirs, too. But it was suspended by the West Side—I know Captain Ainsworth, who was putting up money for us, declined to put up more money until he saw the result at Washington; but we still did keep some men at work, and my recollection is that they kept some men at work, too, but how large a force, I couldn't say.

Q. Well, now, Mr. Gaston, don't you remember that Mr. Elliott came to Oregon in April, 1867, with $15,000 that he had gotten from the Huntington crowd in California, for the California end of this grant, and that that was substantially the extent of his financial resources?

Mr. Fenton: Defendants object to that as incompetent, and as hearsay.

A. No, I couldn't say what his resources were. I only knew by hearsay that he had sold out his interest in the California end of it to the Huntington crowd for $15,000, I think, as I recollect. If he had any other money, or if that was all in money, I don't know.

Q. And do you not remember that after he came here in April, 1867, and organized the last East Side Company, he immediately entered into a contract with A. J. Cooke & Company, which you have heretofore testified was simply Elliott acting under a fictitious name? You remember that?

A. Oh, yes, that was my information. I couldn't tell you how I found it out, but that was given out by their side, that they had made a contract with A. J. Cook & Company. And that circulated sometimes as J. Cook & Company. Jay Cooke was the great capitalist promoter of the Northern Pacific at that time.

Q. Now, do you know that Mr. Elliott immediately went East, and spent the year 1867 trying to raise money on the bonds of his East Side Company, and you were trying to block him in the meantime by sending circulars

to all the bankers of the East, exposing what you contended to be an attempted fraud on the part of Elliott?

A. Yes, I remember that. How long Elliott was in the East about that, I couldn't say. But I know he went East, and that I sent those circulars there to bankers, Jay Cooke, and the Railroad Journal, and everybody else—I got a Bankers' Gazetter, and sent it to all of them.

Q. And do you remember that there was no construction work during the year 1867 by either the East Side Company or the West Side Company, both companies being engaged in an effort to raise money?

A. Yes, sir.

Q. You were raising money here in the West, in Oregon locally?

A. Yes.

Q. While Mr. Elliott was in the East endeavoring to raise it there?

A. Yes.

Q. Now, don't you remember that, as the total result of Mr. Elliott's effort to raise money in the East, all he brought back was a couple of locomotives, which he brought around by way of the Horn, landed them at San Francisco, and then sold them to the Central Pacific, and brought to Oregon as his only financial resources the money that he got from the sale of those two locomotives?

Mr. Fenton: Objected to as hearsay and as incompetent.

A. Well, I know that was the talk, but I don't know that that was all the money Elliott had. I know that before—I think before they sold the locomotives they got $20,000 from Barney Goldsmith here in Portland.

Q. Do you know of any other resources that they had, except the $20,000 they got from Mr. Goldsmith and the money that they realized from the sale of the locomotives?

A. I only know from what men have told me, that is to say, that I would know personally, except hearsay. Now, they got $1,000 from Sam Brown, up there in French Prairie; and they got $1,000 from another man —I tried to recollect his name there, but I couldn't—he is an old friend of mine; and they got money from other people there, that it was never reported, simply because it was a general opinion among people on the East Side, a great many people, that Elliott's concern was not sound, but they were willing to put up money to help build a railroad, if the money was spent, believing that finally there would be a railroad, and that it would not be lost, and that it would help out the fight against the West Side people. Now, that is the way Sam Brown put it to me, and this other man. And each one of them were wealthy farmers, and they put in a thousand dollars apiece that they told me about; and they said others had, but I don't know who the others were. And how much money they raised in that way, I never could find out, of course.

Q. Well, now, isn't it a fact that, after Mr. Elliott started construction on April 17, 1868, he had not proceeded more than sixty days before he was unable to pay his men, and that you used that to embarrass him —you took advantage of that circumstance to embarrass them in the further prosecution of their work?

A. Yes, they missed on a pay-day, and we made all the capital we could out of it against them.

Q. Now, that was the time he enlisted the services of Holladay and brought Holladay to Oregon, or anyway that Holladay came to Oregon?

A. Well, now, I couldn't say about that. Now, they got that money from Barney Goldsmith, and they spent it along. I think Goldsmith put the same sort of condition upon them that the farmers of French Prairie did—that the money must be spent on the road, and not on lawyers; or, as they called it, in lawsuits or that sort of thing. They were willing to give money to help build a railroad, but not for lawsuits. And I couldn't tell you now whether the Goldsmith money was spent before the locomotive money and these different resources—I couldn't tell you. Of course, they would not—it was not to their interest to let out anything that they could keep back.

Q. But you do remember that they were practically "all in," as the expression goes, financially early in their work, and before Holladay came to their assistance?"

A. Oh, yes. And we thought we had them beat

several times. But it was just like the man who thought he had scotched the snake—why, they would curl up again, and start in.

Q. Now, as a matter of fact, Mr. Gaston, don't you know that their corporate minutes show that they were expending a large part of this money that they were getting from the various sources for attorney's fees and the expenses of the fight with you, to try to get the land grant away from you?

A. Well, they had to spend something that way; but I don't think that Mitchell got—he was their principal fighter—I don't think he got much money until Holladay came in; and then they struck Holladay for all the money they could get out of him.

Q. Do you know what Holladay's resources were?

A. I don't know about Holladay's particular resources just at that time; but I know from the statement of men in the East how he got his money to commence business on the Pacific Coast, and whether he had any left for this railroad enterprise or not, I don't know.

Q. Well, don't you know, Mr. Gaston, from your observation at that time and what you learned afterwards, that Mr. Holladay had gone broke at San Francisco and borrowed money from Latham, that Latham had advanced money to him, and finally financed his last venture here in Oregon, with the hope that he might pull out and repay Latham the money that he had borrowed from him at San Francisco?

Mr. Fenton: Objected to as immaterial and not cross-examination.

A. I don't know. Of course, I don't know anything about that certainly. I only heard reports that the money that he beat Russell, Majors & Waddell in Missouri out of—four or five hundred thousand dollars—he had put into steamships out here, and then by his reckless way of doing business he got in debt, and then he had to mortgage his steamships to Latham for money.

Q. Well, didn't you understand that the only money he had to use here in Oregon he got from Latham?

A. Well, I couldn't say that I understood just that; but that Latham was financing his speculations, and that in the end, why, he sent that man—I have forgotten his name now, a friend of his—to Germany to sell the bonds. Latham put up the money to send the people to Germany to sell the bonds. Holladay told me that himself.

Q. Well, now, this first year, 1868, that the East Side Company was engaged in construction, you have told me the fact—it is a fact, is it not, Mr. Gaston?—that they simply put in grading work, which could be done with the least expense, so as to make the greatest showing in the way of mileage?

A. Yes, they did that. They spent their money where it would make the biggest show.

Q. They would take the leveler stretches of the road, where the grading would be inexpensive, and throw in some grading?

A. Yes. And take a side hill and run up there, by New Era there, they could take the shovels and go along and shovel out over the bank there, and make a showing of track for quite a ways without a great deal of money. They did that wherever they could.

Q. Now, about how many miles of grading did the East Side Company do during the year 1868, if you should connect it up and make it continuous?

A. Oh, they must have done—in the way they did it, they must have done considerable over thirty miles.

Q. Well, now, don't you think that $5,000 a mile would be pretty expensive for that kind of grading that they did?

A. Yes, I think it would; but they spent money on other things, you know.

Q. What other things?

A. Well, they had a sawmill, and they had a pile-driver outfit, and various things like that. And then they had to keep up their organization, and those fellows require money. They had to have a superintendent and foreman, and all that sort of thing.

Q. Well, you could grade that tract from Portland to Salem, even as it is graded now, with $5,000 a mile, couldn't you?

A. No, you couldn't do that as it is graded now.

Q. Haven't you included, unintentionally, Mr. Gaston, some of the work that was done in the year 1869? Haven't you got the two years confused in your mind?

A. No. We was figuring on, you know, the session of Congress that came in—we was figuring on what sort of a showing could be made there at Congress.

Q. Well, now, don't you remember that, even after the East Side Company had beaten you in the Legislature and secured the resolution of October 20, 1868, and had again beaten you in Congress and secured the act of April 10, 1869—that even then, with their improved credit, it was all they could do to complete twenty miles by Christmas day, 1869?

A. Oh, I know it was. I know Holladay was exhausted, and they had a whole lot of trouble to get this little piece of road right over here in East Portland. They were awful hard up. And if I had been as smart as I ought to have been, I could have still beaten them. I had a chance to have got money from London, but I submitted the whole thing to Captain Ainsworth, who had put up the money for our side, and he turned down the proposition. I know they were hard up even after they got the action at Washington.

Whereupon witness further testified that he does not think that the East Side Company did more work in 1869 than it did in 1868, except buying of iron, which was a big item. He thinks it was 50 pound rails they put in but he cannot tell where they got the iron. The

iron was brought across the continent on the Central Pacific to San Francisco and then brought up in steamers. In the year 1868 the West Side Company did not do as much work as the East Side Company, by way of construction. He did most of the work for the West Side Company himself with a little party of men and he thinks they had about three little gangs working between the top of the ridge near Portland and Hillsboro. They spent a large part of their resources on some of these heavy grades. The bridges were the biggest items on the twenty six-miles of road from Portland. He could not say whether the East Side Company put any bridges in in 1868. He thinks the East Side Company had a sawmill installed up at, or this side, of New Era before the year 1869. He does not know what representations Mr. Reed made to Congress upon the amount of work that had been done by the East Side Company, in these pamphlets submitted to Congress. Witness issued a pamphlet explaining the unsoundness and crookedness of the organization of the East Side Company and that was circulated. He thinks Mr. Reed probably gave each member of Congress a copy of that pamphlet. He would not now change any statement that he had made in that pamphlet. He would not say now that he had not strained a point a little to depreciate the East Side Company before Congress, because that was part of the game, to belittle their work all they could. He had seen the pamphlets, the East Side Company issued and they pursued the same tactics. It was just about the same thing. Each side was trying to

belittle what the other had done and to exaggerate what his side had done. He fought them with the same weapon. He did not intend to make a downright false statement, he had some friends in Congress that he would not have liked to have caught him in that. Sam Cox and John Bingham from Ohio were very good friends of his and they had known him personally from boyhood. He did not want them to think any the less of him. He thinks that the land Holladay got on the East Side was entirely donated to him and knows that old Gideon Tibbitts gave a tract of land this side of the car shops and thinks that the land Holladay got was given to him. He does not recollect now of the East Side Company buying the lands. Witness thinks that if, on March 19, 1870, Holladay and his associates had expended $800,000 on the east side road, there must have been a great deal more expended during the year 1869 than during the year 1868, but he don't know whether they expended any $800,000—that is just a mere assumption. He remembers that at the time of the organization of the East Side Company, under the name of the Oregon and California Railroad Company, the documents relating to that transaction, all of which are introduced in evidence, show, or purport to show, the expenditure of $800,000 by Holladay and his associates prior to that time, but whether Holladay and his associates had really expended that, he has no knowledge and would not say that the statement of expenditures of $800,000 by Holladay and his associates or its pay rolls were correct. He could only give his opinion

of the value of the work done. He does not believe that Holladay and his associates ever spent $800,000 at that time and he would not give any credit to Elliott's pay rolls because they are payrolls, because he knows from the character of the man that he might make up any sort of a payroll. He could only judge from the appearance of the work done. In judging as to the extent of the work done by the East Side Company he is relying upon the reports of Superintendent M. S. Hart who was a better judge of that than he was. Hart was an old railroad grader and he put more confidence in Hart's judgment than in his own. At the time he saw the work it had not been anywhere near completed for that year. The East Side Company did a great deal more work after witness saw it than they had had done. It was about three months after the East Side Company commenced this work that he went over it, which would be sometime in July and as to what work was done after that, he has no personal knowledge, but is giving the information gained from Mr. Hart. He and Hart went along and saw where the line of the East Side Company was and they had worked a good many places and then Hart told him how much more they had done made his reports to him personally, so that he and Hart had knowledge of how the East Side Company was getting along. At the time witness inspected that amount of work there, he does not think there had been more than $40,000 spent and as to anything that was spent after that he has no personal knowledge but relies simply upon the reports of Hart to him, both as to

quantity of work and the probable amount that had been expended in connection with it, including the character of the work.

Whereupon on re-direct examination witness further testified that he went with Hart on one of these trips checking up this work. They went over the work to see the line of the East Side Company and how it was doing the work and where and getting all the information they could about it. They went as far south as Gervais, clear to the end of the work, and they had a party of men cutting out timber beyond Lake Labish this side of Salem, about 5 miles. He and Hart went over this work sometime in July, the exact date he could not say. He was up to Salem in September or October, 1868 and this was July 1868 when he and Hart went over the work. At that time they had cut out the timber beyond Lake Labish, of course that was part of the grading work. There was grading in French Prairie north of Lake Labish about the time he and Hart went over it, along about Gervais. Hart is dead. Hart was superintendent of the Oswego Iron Works for several years. The West Side Company took him from that work and he was then on construction work of the Oregon Central, West Side, after that, when he made personal reconnaissance of the line of the East Side Company. Hart worked for the Oregon Central, West Side, for a number of years and completed the line from Portland to Forest Grove, laid the track and everything. Witness as an officer of the Oregon Central, West Side, acted upon the report of Hart as superintendent

and engineer as to the value of the work done by the Oregon Central, East Side, in part in his calculations but witness had his own personal views up as late as July 1869. He does not think that he, witness, went over the line after that, towards Salem from East Portland, up as late as October, 1868, although he passed through that country on the old stage road which passed pretty close to this work and he could see from the stage line the work at several points and that the work was going on while the Legislature was in session. The East Side Company was making quite a showing in June, 1868. There was an election at which the respective friends of the two Oregon Centrals had a spirited contest as to who should win the legislature. All through the Willamette Valley people took sides. At that time the election to the Legislature took place in June. Milton S. Latham was president of the London & San Francisco Bank, Limited, a man of financial standing and good reputation as a financier. He had been United States Senator from California and was quite a successful man. He raised the money to build the railroad in California. The Oregon Central, East Side, built a lot of trestle work in East Portland along what is now East First Street and it had graded the track on the ground there and it built the trestles after it got the action of Congress.

Whereupon witness further testified as follows:

Q. I show you, at page 95 of this printed brief of counsel for Elliot in the case of Holladay and Emmet

v. Elliott and others, in the Supreme Court of the State of Oregon, January term, 1879, a picture which purports to be "Defendants' Exhibit No. 11. View of Oregon City—Willamette Falls. Railroad graded under Elliott in 1868. Referred to in P. Buckley's testimony," and will ask you to look at that, and state if you recognize that as a part of this grading done by Elliott in 1868, as shown by that exhibit, and as a picture of Oregon City and the falls, as they looked in 1868.

A. Yes, that is a very good picture of matters about Oregon City at that time; and that is where the track was located there along the foot of the bluff.

Q. That is about where it is now, isn't it?

A. Yes, the same position; and it shows the track here. Away up there is what was called "The Basin." You see, the steamboat men built a bulkhead around the lower end of the cliff—the cliff across the river—and made a basin there, that would bring the steamboats down there where they could shoot the freight right down to the lower boat. That was before the building of the locks and canal.

Mr. Fenton: I offer that exhibit, with the promise to still further connect it with further testimony, and ask leave to take it out of the book or to substitute a duplicate of it from another brief. I think I have another one or can get one; and ask to have it marked "Defendants' Exhibit 367."

It may be stipulated that photographic copies of these exhibits may be substituted in lieu of the originals?

Mr. Townsend: Yes, that is all right. I desire to ask a question with reference to the admissibility of this exhibit.

EXAMINATION BY MR. TOWNSEND.

Q. Are you certain, Mr. Gaston that the track was actually laid in 1868?

A. No, I wouldn't say that; but the grade is on there.

Q. As a matter of fact, I think your former testimony was that you think the track was all laid in 1869, don't you?

A. Yes, I think the track, the iron—the ties and iron—was laid in 1869.

Q. Put down in 1869?

A. Yes.

Mr. Townsend: With that qualification, I have no objection to the admission of this exhibit, although I do not concede that this exhibit was taken in 1868, or that the track was laid as shown in this exhibit in 1868; but will concede, on the faith of Mr. Gaston's testimony, that the grading was done as shown in this exhibit, with the exception of the laying of the ties and rails.

Mr. Fenton: Counsel for defendants desire to state that "they do not know whether the iron was laid in 1868, but do not wish to admit that it was not—leaving that to the testimony."

Whereupon defendants offered and there was re-

ceived in evidence "Defendants' **Exhibit 367**" which is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon witness upon re-cross examination further testified that on this trip in July, 1868, made by him and Mr. Hart, he found stretches of grading at different points along the line. They must have had eight or ten different bunches or crews of men, had one in each place and they were separated by ungraded sections of the road. Some of them had graded maybe a mile or two or more and so on—it varied. He could not say that there were stretches of five or six miles where there had been no grading at all, but there might have been some places, one place as much as that, but they were scattered all along the road, all along the line. As a matter of fact they were doing all they could to get financial support on the East Side all along the line. They were trying to get local support and to create public opinion in their favor and political opinion, in view of the approaching election and all that sort of thing and they were distributing their work with all these things in view. There is no question about that. Their work in the vicinity of Salem was undoubtedly for the purpose of influencing the acts of the Legislature and the people of Salem. They got no support from the people of Salem. They got no subsidy from the people of Salem but got promises of land. They did get land there for a station, but he does not think they got any money. They got money from big farmers, wealthy men, along the line. Brown was quite a wealthy man and there was quite a number

of others in French Prairie who were wealthy, as wealth went in those days. He does not recollect of ever having any conversation with Holladay or Mitchell or any of the people connected with the East Side Company about the statement that the East Side Company made before Congress, heretofore introduced in evidence.

Whereupon GEORGE H. HIMES, called as a witness on behalf of defendants and being first duly sworn testified that he is Assistant Secretary of the Oregon Historical Society and has been an officer of that Society since its organization, December 16, 1898. He has been secretary of the Pioneer Association of Oregon for 28 years and has lived in Oregon over 59 years. He was in business in Portland in 1868, as a job printer and was in Oregon when the Oregon Central Railroad Company, East Side, commenced construction in East Portland on April 16, 1868, and was present at the breaking of the ground on that day. He had occasion to go from Portland to Salem by stage during the summer of 1868, in July and in passing along the stage road of that time came in sight of the track where the line of the East Side Company was laid out and more or less of grading was being done and groups of men were scattered along from place to place covering a distance of several miles. These extended at that time, as near as he can recall somewhere probably between Hubbard and possibly as far south as Woodburn, that is, what is now known as Woodburn. Sam Brown's place is in the vicinity of what is now called Gervais, about two miles distant and there was grading in the vicinity of Sam

Brown's place. He remembers that, because he happened to stay there all night and knew Sam Brown very well indeed. He did not go off the stage road, but just observed the work as he went along, observed the road, the grading condition all in sight of the stage road at all points. This was along about the middle of July, or the first of August, 1868. There was no particular circumstance that fixed that date in his mind. He simply had occasion to go to Salem and had no other way of getting to Salem on a hurried trip at that season of the year, except by stage. The boats were going, but quite often it would take a much longer time to go by boat than by stage. The bars in the river frequently interfered. He remembers once he went and it took him two days to go by boat from Portland to Salem. The event of breaking ground for this East Side Railroad on April 16, 1868, attracted a great deal of attention because it was a movement, or the beginning of the movement, which led the people of that time to pay a good deal of attention to it. It was practically the first railroad. There was a movement the day before on the West Side of the river and there was a starting point of railroad construction. At that time there was no other railroad in Oregon aside from the Portage Road between The Dalles and Celilo and with that exception this was the only railroad in the State commenced. The first settlement was made by Young, in Oregon in 1834. There was Jason Lee on the East Side of the River, ten miles north of Salem, and Young on the West Side of the Willamette River, in the vicinity of what is now

Newburg. Young got there probably a little earlier than Lee, although both arrived in the same year, 1834. That, is the American settlement he refers to. Commencing with the immigration of 1834, which was the largest up to that time, Oregon began settling pretty generally through the Willamette Valley, especially in the vicinity of Hillsboro, in Washington County, and along up the Valley. Commencing 1843, largely in Yamhill County, in the vicinity of Lafayette and McMinnville, 1844 and 1845. W. T. Newby who came in 1843, settled upon the townsite of what is now McMinnville. Between 800 and 1,000 people came in the immigration of 1843, not all adults. There were a little short of 300 men capable of bearing arms who came in that immigration. There was no attempt made in those early days to make any record of the women and children, but he has added enough to the list of women and children so that it aggregates now the names of about 800 all told. Considerable immigration came in 1845, which must have been about 3,000. They settled adjoining those that had already settled—the land was not taken up consecutively, that is, continuously—there were stretches between these settlements that were already made, where others followed. The first settlers, settled along the water courses largely and followed the streams, and the second lot of settlers would settle just next to them, adjacent to water courses. The next large immigration was in 1847, and was probably about the same as that of 1845. There was a large immigration in 1849, but a large part of that went to California. The

discovery of gold on January 19th, 1848, and the information respecting that, got back in to the eastern part of the country the latter part of that year and the spring of 1849 brought out great numbers of people. A goodly number came into Oregon, but the number in proportion to those that went to California was very small. The immigration of 1852 was from 25,000 to 30,000, that is those who came across the plains in the year 1852. The proportion of men coming in that year was much greater than any other year before or afterwards. From his investigations so far, the proportion of those who came into Oregon would be about 10,000 out of the 30,000. They settled just adjacent to these settlements already made, and broadening out from the water courses, from the river towards the foothills. Up to 1852, they took their land commencing after the passage of the Donation Land Law, September 27, 1850, under that law. All claims prior to September 27, 1850, were taken up under what might be termed the land law of the Provisional Government, that is squatters' claims, afterwards perfected donations. There was no large immigration after 1852. There was not much of an immigration in 1865, especially in the Willamette Valley. There was considerable immigration in 1862, 1863, 1864 and 1865 in Eastern Oregon.

Whereupon witness further testified.

"Q. I will call your attention to Defendants' Exhibit 259, which I would like to have you look at. It shows a yellow field in the Rogue River Valley surrounding Medford, where I am now pointing, and a

yellow field in the Umpqua River Valley surrounding Roseburg, and from there on through to Oakland north, and then beginning south of Cottage Grove and all up through Eugene, Junction City, Corvallis, Albany, Salem, Oregon City and Portland. This yellow field shows lands that were lost to the railroad company within the limits of the grant, either by being taken under the Donation Land Law, or as in the Oregon Central Military Wagonroad grant along the Middle Fork of the Willamette, and the Coos Bay Military Wagonroad grant along the Umpqua, and other public land laws by which the railroad grant was lost in that limit. Where with reference to that map were the main donation land claims situated?

A. Well, they were all through from Portland southward as far as to the Calapooia Range, and then there were quite a number of settlers went into Douglas County, what we know now as Douglas County, in the vicinity of Yoncalla and Roseburg, in 1849, '50 and '51, and extended as far south as Jackson County, or Rogue River Valley, as early as 1851, '52 and '53.

Q. Then, as I understand you, Mr. Himes, the oldest settled portions of Western Oregon were in the Willamette Valley and the Umpqua Valley and the Rogue River Valley?

A. Yes, sir. Of coure, there were a few settled over at Port Orford in 1851, and there were some settlements along in the mountains—not in the mountains, but across the mountains, on the ocean side of the Coast Range.

Q. These were chiefly on streams?

A. Yes.

Q. And watercourses?

A. Yes; but on watercourses that had tributaries to the ocean; "some of the inlets or bays."

Whereupon, on cross examination witness further testified that these donation claims had all been taken long prior to 1866. No donation claims were taken, he thinks, later than 1855. It was modified by cutting down to one-half, the number of acres that could be taken under the donation land law. In a general way he thinks that the situation of these donation claims and their location and extent, were well known to local people in 1866 and from that on, so that the parties who secured this land grant for the Railroad Company, he thinks, well knew or must have known, the extent to which the lands had been previously settled upon. His connection with the job printing office commenced July 26, 1865, and was continuous from that date up to January 9, 1899. The original firm name was Carter & Himes. In a general way he knew of the railroad fight between the East Side and West Side Companies and was here while that was going on, and some of the literature with reference to that was printed in his office. He remembers in a general way, after Holladay came and became identified with the East Side Company that the matter was taken into the legislature in the fall of 1868, resulting in a resolution rescinding the designation in the year 1866, of the West Side or Gaston Company.

Whereupon witness further testified as follows:

Q. Now, do you remember after that that the matter was taken before Congress, and was a matter of discussion in Congress and before the committees of Congress, until the passage of the act of April 10, 1869?

Mr. Fenton: Defendants object to that as necessarily hearsay as to this witness. He could only tell what he had read in the newspapers or heard others say.

A. I remember in a general way about that from the public press.

Q. Well, you know those historical facts just as well as you do the historical facts Mr. Fenton has been asking you about, don't you, Mr. Himes?

A. Yes, sir.

Q. As to the settlement of Oregon and all these historical facts? That is true, isn't it, Mr. Himes?

A. That is true, yes.

Q. Now do you remember that in November or December, 1868, the East Side Company had a pamphlet printed by you, which was afterwards used in the controversy in Congress?

A. It was not printed at that time. It was printed in the following year—1870.

Q. In 1869, you mean?

A. No, I think not. It was not printed until 1870. I worked all day—set the whole business up myself with my own hands, did the press work, and I worked

night and day on that proposition some little time; and among other things I worked all day on the 4th of July. It couldn't have been in 1869. I think it was in July 1870 before that was printed. That is, now, the pamphlet I refer to gives what purports to be Elliott's side of the whole controversy.

Q. Well, now, you have the wrong pamphlet in mind. This was a pamphlet after Mr. Elliott's,—

A. Well, the pamphlet I have in mind would be a pamphlet I suppose hard on to one hundred pages. I have a copy of that pamphlet.

Q. This pamphlet that I refer to was printed before Elliott's connection with the company was severed.

A. Oh, I see.

Q. And before his controversy with Holladay arose; but has reference to the controversy between the East Side and West Side Companies. Now, I will show it to you, and see if you can recall it.

A. I rather think that is the pamphlet that Walling printed.

Q. No.

A. In looking this over, I see it was not the pamphlet I had in mind.

Q. Here is the resolution at the close of it.

A. This is a short, small pamphlet as compared with the other.

Q. Here is the resolution that goes with it, which

shows that, "At a regular meeting of the Directors of the Oregon Central Railroad Company, held November 25th, 1868, the following proceedings were had: 'On motion of Mr. Ellsworth, the foregoing statement of facts was unanimously adopted by the Board and the President and Secretary were instructed to officially sign the same, and attach the seal of the company thereto.'

I. R. Moores, President.

Saml. A. Clarke, Secretary."

A. I remember this pamphlet very well.

Q. Now, don't you remember that that was printed after the fight was concluded before the Legislature in Oregon here in 1868, and before the fight was concluded in Congress?

A. Well, I couldn't say. I remember the printing of that pamphlet as to its relation to the fight that was going on. Of course, I don't know that I have any recollection about that at that time, but, of course, it must have been by the showing of the date.

Q. Do you remember who had you print that?

A. I am not sure, but I think that—of course, Mr. Carter was the senior partner in the office, and he knew Mr. Moores very well, and he knew Mr. Ellsworth very well—Strictly Ellsworth—and my recollection about it is that the arrangement for printing was concluded between Mr. Moores and Mr. Ellsworth; and I was there, of course, as a partner, but was busy about other mat-

ters in connection with the office; and I have no distinct recollection about this matter, any further than that the copy and everything was turned in by those men, and then, of course, I did my work in connection with the printing of it; and as far as the business end of the transaction was concerned, I had no special thing to do with it; although in a great many cases—Mr. Carter was out of the office a good deal—I took in work; but in that particular case I never met Mr. Moores or Mr. Ellsworth up to that time.

Q. And is Mr. Carter alive?

A. No, he has been dead a number of years.

Q. Would there be any way in which you could ascertain the date that that was printed by you people?

A. Well, if you give me the date I will make a memorandum of it. I am not sure—I think, however, that I can tell.

Q. The date of the resolution of the Board of Directors of the Oregon Central Railroad Company in which it was directed that it be signed is November 25, 1868, and I therefore assumed in my former question that it was printed after that time. We have other evidence that it was in existence early in 1869, and I just wanted to see if you could not tell—

A. Well, I think it is possible that I can determine that date, although it might take me some time. I believe that I have the account books of the firm of that time. They would be stowed away among a good deal

of other stuff, and it might take me some time. I would be glad to look them over, and hunt it up. Now, just excuse me one moment—what is the date where the imprint is on that page, the date of that?

Q. That is 1868. You can testify that that is correct, can you not?

A. Yes, there is no question about that. That is correct, 1868—the firm of Carter & Himes was organized, or rather the partnership was entered into on October 5, 1868. The firm prior to that date was simply W. D. Cater, but our terms of copartnership began on October 5, 1868.

Q. And how long did it continue?

A. And it continued one year. It would take it in 1868 and up to the following year, 1869.

Q. So that this pamphlet must have been printed—

A. That was printed between October 5, 1868, and December 1, 1868. Somewhere along there.

Q. Well, now, are you acquainted enough with the manner in which the work was done so as to be able to testify that that was printed with the authority of the officers of the East Side Company?

A. Well, I should say it was, without any—scarcely any doubt. But in order to satisfy myself absolutely respecting that, I think it would be very necessary for me to overhaul the old books, if I can find them—and I believe I can—and see who made the entry, whether I made the entry myself for the work, or whether Mr.

Carter made it. If I made it myself, I could probably give some information about it; but if Mr. Carter made it, I could not.

A. Now, I was going to say in this connection, I have a very distinct recollection of doing some printing for Mr. Gaston, but I am not able, from anything that I can recall in connection with the wording of this, to say that that was what Mr. Gaston had printed; but I do know that Mr. Gaston had something printed. He made the arrangements with Mr. Carter. I did the typesetting myself. But it seems to me, from my recollection, that the matter Mr. Gaston had printed respecting matters of the railroad, was not so voluminous as that appears to be. But I would like, if it is possible, to see the original of that. I perhaps might be more sure.

Mr. Fenton: May I ask counsel what Government's exhibit you are asking the witness about?

Mr. Townsend: 105.

A. Yes, I remember this very well indeed. (Printed exhibit.)

Q. Well, now, Mr. Himes, having examined the original of Government's Exhibit 105, a typewritten copy of which was exhibited to you before, are you prepared to testify that Government's Exhibit 105 was printed by the firm of which you were a member, some time between October 5, 1868, and December 31, 1868?

A. I am, yes, sir.

Q. You know that at no time you permitted a false

date like that to get out?

A. Never. Never.

Q. From your general knowledge of the manner in which the business was conducted, and the business habits of yourself and Mr. Carter, and your general knowledge of this entire subject, the history of this railroad fight, are you not prepared to state, according to your best recollection, that the document was printed with the authority of those who acted for the Oregon Central Railroad Company, East Side?

Mr. Fenton: Defendants object to that as not the best evidence, and as only hearsay. You may answer.

A. My judgment is that publication was printed at the instance of Mr. Joseph Gaston—in my judgment.

Q. Mr. Joseph Gaston?

A. Yes.

Mr. Fenton: No. He has got it mixed up.

A. Yes, sir. Another publication that I had in mind, and I thought when I was looking over it casually that there was some reference to that—but I am satisfied that was printed by Mr. Gaston, or caused to be. I had nothing to do with the business arrangement. I remember those circumstances in connection with it—I wouldn't swear to it positively, but then it is my impression—I know that we printed a publication for Mr. Gaston connected with the railroad matters, and it gave a recital of the affairs in connection with the organization of the company, and also it related to some difficulty between

the two corporations, so-called.

Q. Well, you knew which company he was connected with, didn't you?

A. I knew he was connected with the West Side Company.

Q. Well, do you mean that Mr. Gaston put out a document purporting to be the authorized document of his adversary?

A. Well, of course, I couldn't go into the merits and give the reasons, or anything of that sort, but it is my judgment now—I cannot get rid of that impression. I know we printed something for Mr. Gaston, and I am satisfied, as far as I can recall, that that is the document. As I say, I am not positive of it. Of course, there might have been some other, but it has the earmarks of Mr. Gaston's work, as I understood the situation at the time. Of course, as I say, the business arrangements were made between Mr. Gaston and Mr. Carter. Mr. Gaston didn't know me in the premises, and I didn't know him, except simply as he came in. I remember distinctly a circumstance like this in connection with it; whatever the document was, there was a question about the payment for it; and I am not sure but Mr. Gaston brought the work to me first, when I come to recollect the circumstances connected with it, and that there was a job of a little bit more magnitude than I felt disposed to take into account without inquiring into the financial responsibility of the party offering the work; and that Mr. Carter came in soon afterwards, and I said to him "Here is a job that

is left here, but I didn't give him a price on it, because it is a man I don't know, and I want you to take care of it." And I remember that he said that there was quite a little work about that, and that we would have to be sure of the financial end of it. And when Mr. Gaston came in and talked the matter over—of course, I couldn't hear what was said; but whatever it was, it was entirely satisfactory, and the work was proceeded with and finished. The only way I could absolutely be sure would be simply to go back—I think I can find the old books of that date, and that would settle the question in my mind.

Mr. Townsend: I think Mr. Himes is mistaken.

A. It may be a confusion in the two different pamphlets.

Mr. Townsend: This is a scurrilous attack on Gaston, which he answered.

A. Now, this, I was going to say—of course, I didn't look it over only simply to examine the text of this—I simply recognize the printing and the type and everything of that sort; no doubt about that, not the least bit. We printed a pamphlet for Mr. Gaston. There is no question about that part of it. But my idea of the pamphlet that Gaston printed—and I didn't examine this more than simply looking at the type to find out the discussion of the text—only my idea of it was this: that it was a history, so to speak, of the transactions between the two companies, and an attempt on his part to show that the East Side Company had no rightful claim to the name.

Q. But this pamphlet is right the reverse.

A. Well, then, I am mistaken.

Q. This is an attack on the West Side Company.

A. Well, then, I am mistaken then, because, as I say, I didn't look it over sufficiently to get at the bearing; I just simply looked through to gather the type, and the headlines, and the subdivisions.

Q. You do not mean to put into the record here any suggestion that Mr. Gaston came to your printing office and had a pamphlet issued in the name of the other company, the East Side Company?

A. Oh, no, no; not by any means.

Q. Well, if this pamphlet, Government's Exhibit 105, is an attack by the East Side Company on the West Side Company, then that is not the pamphlet that Mr. Gaston brought to you?

A. No, that is not the pamphlet that Mr. Gaston brought to me. As I say, I didn't examine it thoroughly enough to get the trend of the document. There was only one point of doubt in my mind—that the pamphlet we printed for Mr. Gaston was not quite so voluminous as that one appears to be, or as that one is. The circular that Mr. Gatson brought, I couldn't really say how many pages, it was his side of that controversy, or at least bearing upon his side.

Q. There were several circulars issued. How about this one—Government's Exhibit 108? Do you recognize that type?

A. No, I think that is printed by A. G. Walling. However, there was one form of type that each of us had in common, and were frequently loaned some sorts, as we say, from one to the other, and it is possible that that might have been printed by our firm. We only printed —there was only one job that was printed for Mr. Gaston.

Q. How about that?

A. Well, I printed that.

Q. That was one which he did have printed? That is the Newby case.

A. I printed that.

Q. No, this is the brief of Mitchell, Dolph & Smith. Let's see if I can't get their brief in the Newby case.

A. There is the document I had in mind. I printed that.

Q. This is the document which was used before the Oregon Legislature presenting the claims of the West Side Company.

A. Well, that is the document—that is the one. I was mistaken. When I looked through that, there was so much more matter. I know that one you have your hands on.

Mr. Fenton: You better identify it, hadn't you? Salem, Oregon, October 13, 1868. Signed T. R. Cornelius.

Mr. Townsend: It is not necessary to put that in,

is it?

Mr. Fenton: No, it is not necessary. The witness says that is the one he printed, not the other.

A. Yes, that is the one.

Q. Mr. Himes, I have presented to you a book consisting of newspaper clippings, pamphlets and various documents and letters, which are collectively bound together and entitled "Oregon Railroad History," which has been compiled by Mr. Gaston from the various documents that he has had relating to the early railroad history of Oregon, and having directed your attention to a certain pamphlet issued by the West Side Company, under date of October 13, 1868, addressed to the Oregon Legislature, I will ask you if that is not the document which Mr. Gaston brought to you to have printed, instead of Government's Exhibit 105?

A. Yes, sir. I am very clear about that now.

Q. Did Mr. Gaston bring more than one document to you?

A. Only one.

Q. So that you are now positive that you were mistaken when you said that you thought he brought Government's Exhibit 105?

A. Yes, sir.

Q. Well, now, going back to that question again, have you any way of refreshing your recollection, without going over these old records that you spoke of, as to

who did bring this to you to be printed, referring to Government's Exhibit 105?

A. No, I have not. I couldn't remember.

Q. Well, I will not ask you to do that if it involves too much labor, Mr. Himes; but if you should happen to run across it without too much effort, would you please let us know?

A. Yes.

Q. And we can recall you to testify upon that subject.

A. Situated with the work that I have in hand today and tomorrow, it would be almost impossible; but I think that I can find it during the week, that is, in the course of a couple of days, and let you know.

Q. It is not of sufficient importance to justify our imposing upon you, Mr. Himes. If you can do it without too much inconvenience, I will thank you.

A. All right.

Whereupon J. C. MORELAND, called as a witness on behalf of defendants, being first duly sworn testified that he resides at Salem and is clerk of the Supreme Court and came to Oregon in 1852. He was referee in the case of Ben Holladay and C. Temple Emmet, plaintiffs against Simon G. Elliott and others, defendants, brought in the Circuit Court of the State of Oregon for Multnomah County and appealed to the Supreme Court of the State of Oregon, and heard and determined in the Supreme Court, in July 1879, and took and reported

all the testimony in that case, except a few depositions that were not taken before him. Most of it he took in long hand. The testimony of S. G. Elliott was taken down in short hand by A. J. Marsh and reduced to long-hand by him and read over to Elliott in the presence of witnesses. "Defendants' Exhibit 368," being a document of date April 23, 1867, purporting to be an agreement entered into between the Oregon Central Railroad Company of Salem, and A. J. Cook and Company, for the construction of the first 150 miles of the Oregon Central Railroad Company's railroad (East Side) was an exhibit offered and admitted in evidence in that case, and he knows the signature of I. R. Moores and Ben Holladay and the signatures to this document by these parties are genuine. He knows the signature of S. G. Elliott and of A. J. Cook & Company by S. G. Elliott and that is the genuine signature of S. G. Elliott. He knows the signature of John H. Mitchell and is not sufficiently acquainted with the signature of M. N. Chapman to identify it. Both of these men are dead. The endorsement or assignment, or purported assignment, of that document on the back of it, dated May 2, 1867, signed Albert J. Cook in the presence of W. D. Litchfield was on the document at the time it was introduced in evidence, but he does not know the signature of Albert J. Cook or W. D. Litchfield. He knew George L. Woods, president of the Oregon Central Railroad Company, and Samuel A. Clarke, secretary of the Oregon Central Railroad Company, and they are both dead. He is not sufficiently acquainted with the signature of

George L. Woods, but has seen his signature a good many times. He has seen the signature of Clarke and knows it very well and that is his signature. He has no question about that. When this document was admitted in evidence before him it was admitted without question to have been executed by the parties; both parties recognized it as the original. The signature in red ink on the front page of that cancellation signed "Ben Holladay & Co. Oregon Central Railroad Company, By I. R. Moores, President. Oregon Central Railroad Company, By Geo. E. Cole, Secretary." Witnesses "J. H. Mitchell" and "M. N. Chapman" are the signatures that he recognizes. These are the signatures of all these parties. That cancellation was on there at the time that this document was admitted in evidence before him. He commenced taking the testimony in this case in 1870 and it was continued at intervals until 1875. The signature on the assignment, or a part of it, by S. G. Elliott, of date May 20, 1867, witnessed in the presence of Walter Van Dyke, is the signature of S. G. Elliott, and it was on there when the document was admitted in evidence. "Defendants' Exhibit 369" purporting to be a memorandum of agreement of date May 12, 1868, between the Oregon Central Railroal Company and A. J. Cook & Company, and which purports to be signed on behalf of the Oregon Central Railroad Company "I. R. Moores, President O. C. R. R. Co., S. A. Clarke, Secretary O. C. R. R. Company, A. J. Cook & Co." Witnessed by Geo. Anderson and E. D. Towl, is a document he recognized as having been admitted in evidence before him and these signa-

tures are the signatures of I. R. Moores, and S. A. Clarke. The signature of A. J. Cook & Co. is in the hand writing of S. G. Elliott. The signatures of Ben Holladay, I. R. Moores, George E. Cole and J. H. Mitchell, on the document to the cancellation in red ink on this document of date March 29, 1870, signed "Ben Holladay & Co. Oregon Central Railroad Company, By I. R. Moores, President. Oregon Central Railroad Company, By Geo. E. Cole, Secretary." Witnessed by "J. H. Mitchell and M. N. Chapman," are the signatures of Ben Holladay, I. R. Moores, George E. Cole and J. H. Mitchell, and that endorsement and these signatures as they now purport to be, were on that document at the time it was admitted in evidence before him. Referring to "Defendants' Exhibit 369" which shows file marks "Filed Nov. 24, 1875, Geo. L. Story, Clerk, By R. L. Durham, Deputy," and then "Filed June 19, 1876, D. H. Murphy, Clerk," witness stated that George L. Story was clerk of Multnomah County and D. H. Murphy was Clerk of Marion County. The case was transferred for hearing from Multnomah to Marion. There was change of venue and the case was tried before Judge Boise. Judge Shattuck, who was on the bench in Multnomah County, had been an attorney in the case. He did not know how the file mark before the Clerk of the Circuit Court of Multnomah County came to be made. He had turned all the documents and papers in to the clerk of Multnomah County when he was through with it. The document purporting to be signed "Albert J. Cook, in the presence of W. D. Litchfield,"

bearing date May 2, 1867, purporting to be "Exhibit "W" attached to S. G. Elliott's deposition," and initialed "J. C. M." was an exhibit in the case and was introduced in evidence during the taking of S. G. Elliotts deposition, and the words "Exhibit 'W' " attached to S. G. Elliott's deposition is initialed "J. C. M." and are in the hand writing of witness. He did not know the signature of Albert J. Cook or the attesting witness W. D. Litchfield. This document was introduced by Elliott and sworn to as genuine.

Whereupon defendants offered in evidence each of these respective documents, "Defendants' Exhibits 368, 369 and 370," to which complainant objected as incompetent, irrelevant and immaterial, and hearsay, which said documents were received in evidence and are hereinafter set out and dscribed and made a part of this Statement of the Evidence and identified herein as such.

Whereupon witness further testified that Elliott was a witness in this case before him and called and recalled a good many times, and that these original documents belong in the custody of witness as clerk of the Supreme Court and that he would like to have these documents returned.

Whereupon it was stipulated that these original documents could be withdrawn and said Exhibits extended in the record by the Examiner and a copy thereof verified by the Examiner substituted therefor.

Whereupon witness further testified that he came to Oregon from Boise City, arriving on July 3, 1868. His

father then lived in Clackamas County, and shortly after coming he went up there and was there two or three times that summer and fall. He had never seen a railroad except those from lower to upper Cascades and from The Dalles to Celilo, and he was a good deal younger than he now is and was interested to see what a railroad would look like, and he paid some attention to that. He was over on the French Prairie and as far up as what is now the town of Gervais, or very nearly there. He was up to Sam Brown's place during that summer and fall, and wherever he got a chance or was in sight of it he would leave the road and go over and look where they were grading, between Oregon City and Portland. He was over that road three or four times that year. The grading was scattered along from about Stark Street in East Portland up to about as far as he was along that road, approximately where the town of Gervais is now. It is about thirteen or fourteen miles from Salem. He is not able to state how many gangs of men were working between these points grading, but they were scattered all along the way. He saw them quite frequently. He does not think that he is competent to judge of the value of that work. He was never engaged in it. He could not now identify the photograph "Defendants' Exhibit 367" as having been taken in that case, but knows there were a number of photographs introduced. This photograph represents Oregon City of course, taken there at Oregon City. That is familiar to everybody that is familiar with Oregon City, but this was not taken until after the road had been built, this was taken after 1868 because there

were not any rails laid there in 1868 at that point. When he took the testimony the road had been built. There were no rails there in September, 1868. He is very certain that picture was taken after that. There was some work done on the grading. Referring to "Defendants' Exhibit 371" witness says that it looks very much like that wall did up there, and a good deal like it does now. It has been changed some.

Whereupon said "Defendants' Exhibit 371" was offered and received in evidence and is hereinafter set out and described and made a part of this Statement of the Evidence and identified herein as such.

Whereupon witness further testified that he has been continuously a resident of Portland from 1868 up to June, 1907, and since then a resident of Salem, and is familiar generally with the general value of timber lands in Oregon from 1866 up to 1892 and thinks that timber lands as such were practically valueless up to sometime in the '80s. Then there began to be some demand for timber lands, as he recollects it, sometime, he could not fix the date, but it was along in the latter '80s he should fix it. In the early days in Oregon timber was not considered of any value. Men wanted places for farms and when they took a farm they burned up the timber. On his father's claim out in Clackamas County, trees that would make elegant saw logs, were burned to get them out of the way. The timber, on land in the Willamette Valley that had timber on it, in those early days that was needed for farm purposes, was all destroyed. There was no sale for the timber at all. His father took

a donation land claim in Marion County, approximately five or six miles east of what is now the town of Hubbard, it was pretty nearly in Clackamas County. Historically the first American settler in Oregon was Jason Lee in the year 1834. He settled ten miles below Salem in what is known as Mission Bottoms. In pioneer days, there was quite an immigration in 1843, some came every year from 1834 on, but the first large immigration came in 1843, there were about 1,000 that year. The next large immigration after that was in 1852, that was the largest immigration, he thinks, that ever came across the plains. It was considerably larger than in 1843. These people settled all the way from Multnomah County to Jacksonville. Some people who came in their train went out as far as Jacksonville and they took up their land mainly under the donation land law of 1850. Prior to 1866 there was a railroad built from The Dalles to Cellilo around the portage and he thinks this was built about 1866. He knows it was there in 1867, because he traveled over it. It was built by the Oregon Steam Navigation Company and as part of the link to operate their steamers in river transportation. With that exception there was no railroad in Oregon prior to the road built from Portland south. The construction work on the Oregon Central, East Side, and the constructon work on the Oregon Central, West Side, was the first railroad construction work in Oregon, with the exception of this link referred to as built by the Oregon Steamship & Navigation Company. Those were great days for Oregon when the road was opened. There were some settlements

along the edges in the mountains in those days, extending up into the Cascade Mountains out beyond the Sandy. He was through there in 1866 and there were some—one cabin he knows beyond the Sandy on the road across the Cascade Mountains. These settlements were along streams and on lands that they could secure for agricultural purposes and grazing, but there were only a few settlers in the mountains.

Whereupon on cross-examination witness further testified that the litigation between Elliott and Holladay and others, extended over a period of several years and the case was of a good deal of importance for those times and in that case the general early history of the building of these railroads was gone into quite thoroughly. In that suit Holladay and his associates did not seek to cancel securities held by Elliott, but to cancel a contract of partnership that was entered into between Holladay and Elliott. That was the subject of the suit, to cancel that partnership, these partnership articles. The general object of the suit was to dissolve the partnership. To some extent it did involve incidentally some of these corporate securities that Elliott had claimed in that suit. Holladay and his associates claimed to have made certain advances for the benefit of the former copartnership, which were to some extent disputed by Elliott, and Elliott claimed to have made some advances which were to some extent disputed by Holladay. It is true, that to take the testimony of Elliott as to what he advanced, by way of money, he could find corresponding testimony on the other side of the case, disputing these items in whole

or in part. In that litigation, Holladay claimed a considerable balance from Elliott and Elliott claimed a considerable balance from Holladay. In the final judgment of the Supreme Court, that is as far as his findings were set aside, the Court found that Holladay was indebted to Elliott about $28,000 on that agreement signed by C. Temple Emmett for Holladay and Emmett, of $21,000 at the time the partnership was entered into. The Supreme Court found that had not been paid. With that exception, the accounts were balanced. He does not remember how much Elliott claimed from Holladay in that suit, but it was a great many thousand dollars. The amount which Holladay claimed against Elliott aggregated a good deal in the way of damages that he claimed against Elliott for breach of the copartnership and for failure of Elliott to carry on the work. Witness reported findings of fact and performed the office of a master in chancery under a strict equity practice. There was considerable conflict in the evidence as to the manner of the work that had been done by Elliott and as to his competency to perform the work. There was a great deal of contradictory evidence. It was contended in that case that Elliott had misrepresented his financial backing and the question as to who Albert J. Cook was, and his backing was very extensively gone into. To his mind there was never any satisfactory evidence to account for Albert J. Cook. He heard the evidence on both sides and thought that Elliott had been operating under the name of Albert J. Cook and that Albert J. Cook was either a myth or some insignificant person that

Elliott had picked up and who was without any financial backing at all. Albert J. Cook had nothing to put into the concern so far as he recollects. He does not think Elliott claimed that Cook had put anything into it. His recollection is that Elliott did not organize the Oregon Central Railroad Company.. What influence a prospective contract with Elliott under the name of A. J. Cook & Company had in the organization of the Company, he does not know. His recollection is that the Oregon Central Railroad Company, East Side, was organized by a company of men interested in having a railroad on the East Side as against a railroad on the West Side and he does not think Elliott had that company organized. That is his judgment about it now.

Whereupon witness further testified:

Q. Don't you remember that Elliott came to Oregon early in 1867, and first tried to do business with Gaston, and then having failed caused this new company to be organized and capital stock to be subscribed in the name of the corporation itself, and then the construction contract which he immediately caused to be executed provided for the turning over of a large part, if not all, of that capital stock to him as A. J. Cook and Company, and that it was because he held that stock that Mr. Holladay, for one reason, organized the Oregon and California Railroad Company in 1870. And in this litigation Mr. Elliott was asserting some rights by reason of this preferred stock of the old East Side Company, possession of which he secured under this construction contract

he had held.

Mr. Fenton: I object to that as not in accordance with the record of either the Oregon Central or the Oregon and California Railroad Company.

A. It has been a long time ago and my memory may play me false as to that, but I do not now recollect that Elliott claimed any stock in the company. He claimed large interests under mortgages that had been introduced, but if Elliott had ever had any of that stock of the Oregon Central Railroad Company my memory fails now. I have not looked over this thing since 1875 to any great extent. If he got any of that stock I am not certain. These articles of agreement I have not read, but if he got any of that stock my memory plays me false. My recollection on that is not at all distinct—my memory. The stock, I think, was not made any particular question in this case because the stock was regarded as absolutely valueless. I have forgotten what became of the stock.

Q. Both sides treated the Oregon Central Railroad Company (East Side) as an invalid corporation, and as in effect a copartnership, did they not?

A. Well, I think it was rather conceded that that was an invalid corporation; that the president could not subscribe the majority of the stock.

Q. And that was the decision of the Supreme Court finally?

A. I so understand it.

Whereupon witness further testified that he and his people when they first came to Oregon went to live in Clackamas County, about six miles from the town of Hubbard, in township 5 south, range 1 east. The country there is pretty level and is a considerable distance from the foothills. His father took a donation land claim of 320 acres. The law was amended in 1852 so that he could take only a half section. Prior to that time they could take up a section. It was all timbered in spots. The timber was scattered but it extended all over the place. A great deal of it was good saw timber, a great many good saw timber trees were on the place. A good deal of that land is cleared now. When they lived there, there was probably not over 20 acres cleared. It was cleared in the main by hard work, by cutting down the trees and then burning them up and then grubbing up the grubs and hazel brush that were on them. If one would undertake the job of burning down one of these big fir trees and burning it up, it would, he thinks, be a big obstacle, although not insurmountable. It was good land, good soil, when cleared, but the clearing of those big trees was a big job.

Whereupon witness further testified.

Q. Yes, but here is what I am getting at, Mr. Moreland. In this case there has been some testimony introduced tending to prove, or at least intended to prove, that some of the lands, if not all of the lands involved in this case cannot be used for the purpose of settlement and cultivation, and one of the reasons as-

signed is the presence of the timber on the land. And what I am trying to get at is that that same obstacle was encountered by the early settlers, even under the donation claims.

A. Yes, sir. And it cost more to clear the land of those fir trees when they had to be burned up than the land was worth after it was cleared, if a man got anything for his wages while he was at work at it.

Q. Now, if the timber has since acquired a value, and it can be sold to assist the settler in clearing the land, then the difficulties confronting the settler are not as great today as they were then?

A. Nothing like as great if he can sell the timber. If we could have gotten pay, stumpage, for the trees that had to be burned up on that place the way they are paying for them now, the place would have paid for itself, I think. The timber would have paid for clearing.

Whereupon upon re-direct examination witness further testified that the Willamette Valley generally was not a timbered country when he came to Oregon. There were a great many prairies. The donation land claims that were taken were mainly taken in the valley, on level land. The preferred claims in these early days were on the prairies. Referring to "Defendant's Exhibit 259" and the yellow field on the map showing lands lost to the Company's grant by prior settlement in the vicinity of Needy and around there, witness further testified that the country around there was chiefly taken under the do-

nation land law, or some public land law prior to the time the railroad grant took effect. That it was all taken up as far as they thought it could be cultivated then. Out in Molalla there was a very beautiful prairie. There was no timber there. That prairie was taken up by early settlers before they came to Oregon. His father lived on his donation claim eight years and made their living on the place. They made all the living they got on the place, that is, his father used to go away and work for some of the neighbors very frequently and the boys and girls worked on the place and did what they could, but it was hard picking. He was eight years old when they came there.

Whereupon witness upon re-direct examination further testified that he remembers that there was a contract of partnership entered into between Ben Holladay, C. Temple Emmett and S. G. Elliott of date September 12, 1868, and that that was the contract involved in that suit. That suit was begun very shortly after Holladay discharged Elliott as superintendent. It was a question as to Holladay's power, Elliott being one of the partners, whether Holladay had the power to discharge Elliott from the position to which he was assigned by these articles of co-partnership and he thinks he was discharged in September, 1869, but he is not certain. The suit was begun, he thinks, less than a month after that, but he does not remember, the records will show that.

Whereupon witness identified his findings of fact and conclusions of law as referee in the case of Ben

Holladay and C. Temple Emmett, plaintiffs against S. G. Elliott and others, defendants, about which he has testified and the same were offered and received in evidence, together with the certified copy of the findings and decree of the Supreme Court of Oregon in that case as one exhibit, subject to the same objection heretofore made by complainant as to proceedings in that case, which said findings of fact and conclusions of law and certified copy of findings and decree of the Supreme Court are in words and figures as follows, to-wit:

"In the Circuit Court of the State of Oregon, for the
" County of Marion. At Chambers, September 28th,
" 1877, before his Hon. R. P. Boise, Circuit Judge.
"Ben Holladay and
"C. Temple Emmet,
Plaintiffs,
vs.
"S. G. Elliott, Gardner Elliott,
"T. R. Brooks and J. B. Rogers,
Defendants.

"This cause having been heretofore tried, on the motion of plaintiffs to affirm the report of J. C. Moreland, Referee, and the objection to said report filed by the defendant, S. G. Elliott, which report is as follows, viz:

"In the Circuit Court of the State of Oregon, for Mult-
"nomah County.

"Ben Holladay and C. Temple Emmet, plaintiffs, vs. S. G. Elliott, Gardner Elliott, T. R. Brooks and J. B. Rogers, defendants:

"I do hereby certify that I have taken the testimony

offered by the parties, and the same is herewith submitted in eleven volumes, together with the printed deposition of Ben Holladay and a large number of exhibits, papers, documents and drawings.

"The findings embrace every issue upon which I have been requested by either party, and upon the issues raised by the pleadings.

"The case was argued for the plaintiffs by J. N. Dolph, Esq., and submitted by the defendants without any argument on the 8th day of November, and the testimony, together with my findings of facts are herewith submitted.

"That each of the witnesses whose testimony was taken by me before proceeding to their examination, were severally sworn by me to tell the truth, the whole truth and nothing but the truth. Said depositions were read over to, or by each of said witnesses, and then by them severally subscribed.

"J. C. Moreland, Referee.

"In the Circuit Court of the State of Oregon for Multnomah County.

"Ben Holladay and C. Temple Emmet,

Plaintiffs,

vs.

"S. G. Elliott, Gardner Elliott, T. R. Brooks and J. B. Rogers, Defendants.

"To the Hon. E. D. Shattuck, Judge of the Court above entitled:

"Having been appointed sole Referee in the above entitled case on the 25th day of July, 1870, and having taken the testimony offered by both parties (which is herewith submitted, together with the minutes of my proceedings thereon) I beg leave to submit the following as my

"FINDING OF FACTS.

"First—That on the 12th day of September, 1868, the plaintiff, Ben Holladay and C. Temple Emmet, and the defendant, S. G. Elliott, entered into a copartnership of that date for the purpose of constructing, equipping and operating one or more railroads in the State of Oregon, and the States and Territories adjacent thereto; that by the terms of said copartnership the interest of each member thereof was as follows: Ben Holladay, 24-40 parts; C. Temple Emmet, 10-40; Simon G. Elliott, 6-40.

"Second—That said copartnership articles contained also the following special agreement: And, whereas, The parties hereto are about to purchase and take an assignment of all the contracts now subsisting between the Oregon Central Railroad Company of the one part, and A. J. Cook of the other part, and between the Oregon Central Railroad Company of the one part, and A. J. Cook & Co. of the other part, for the construction and equipment of the railroad from the city of Portland to the northern boundary line of the State of California.

"It is hereby further witnessed, that the said Simon G. Elliott shall not be called upon to advance out of his

own private means any money towards the work undertaken by this copartnership under the said contract, but the said Simon G. Elliott shall be charged with and shall account for his proportion of the expense of the said work whenever this copartnership shall have realized under and by virtue of the said contracts, or any of them, sufficient moneys to cover the outlays and expense incurred and paid by this copartnership in and about the said work. And it is further understood and witnessed, that the said Simon G. Elliott is hereby appointed the General Superintendent of the work of constructing, equipping and operating the said Oregon Central Railroad under the said contracts, and that he is to receive a salary of five hundred dollars per month, payable in gold coin of the United States.

"Third—That after the execution of the articles of co-partnership, and as part of the partnership transaction, plaintiffs gave to the defendant, S. G. Elliott:

"Office Ben Holladay & Co.

"Portland, Oregon, Sept. 12th, 1868.

"S. G. Elliott, Portland:

"Dear Sir:—On our purchase of this date from A. J. Cook & Co. of the pending contracts with the Oregon Central Railroad Company for the construction of the railroad from Portland to the California line, it is understood that we are to pay you the money furnished by you to the firm of A. J. Cook & Co. and standing to your credit on their books. This money is stated by you

to amount to about twenty-one thousand dollars. When the accounts are fully made up and the balance correctly ascertained, you will be entitled to our obligations for the correct amount. Respectfully yours,

"Ben Holladay & Co.

"That said paper was not executed on the day it bears date, but it correctly expressed the agrement between the parties thereto.

"Fourth—That on the 12th day of March, 1867, the defendant S. G. Elliott, procured from one A. J. Cook, at San Francisco, California, a written power of attorney to himself, to make all necessary arrangements with certain parties in Oregon for the building of a railroad from Portland south through the Willamette Valley, a distance of one hundred and fifty miles.

"Fifth—That said Cook was a man of small means, inexperienced in railroad matters, and that the writing was obtained from him at the request of defendant S. G. Elliott, with the understanding and under the agreement that said Cook was to have no interest whatever in said contracts to be made, and was not to be made liable for anything whatever, and that he took no part or interest whatever in the contracts afterwards made.

"Sixth—That on or about the 22d day of April, 1867, a corporation was formed under the general incorporation laws of this State, under the name of the Oregon Central Railroad Company, for the purpose of building and operating a railroad from Portland, Ore-

gon, southward to the California line, on or near the stage road, and having its principal office in Salem, Oregon; but that on the 23d day of April, 1867, only seven shares of stock had been subscribed to the capital stock thereof, by bona fide subscription—said Oregon Central Railroad Company, by George L. Woods, chairman, on the 22d day of April, 1867, having attempted to subscribe seventy thousand shares to said capital stock, and that there were never but thirty-one shares subscribed to the capital stock of said corporation, excepting said seventy thousand so attempted to be subscribed, the capital stock of said corporation being $7,250,000, divided into 7,250 shares of $100 each.

"Seventh—That at the time of the incorporation of said company there was another company organized and incorporated under the general incorporation laws of the State, under the name of the Oregon Central Railroad Company, for the purpose of constructing, maintaining and operating a railroad from Portland south to the California line, having its principal place of business and office at Portland, Oregon—said corporation being designated in these findings as the 'O. C. R. R. Co. West Side.' The first named being designated herein as the 'O. C. R. R. Co. East Side.'

"Eighth—That on or about the 23d day of April, 1867, the defendant S. G. Elliott, in the name of A. J. Cook, entered into a contract with the said O. C. R. R. Co., East Side, for the construction and equipment of one hundred and fifty miles of its road from Portland

south, a true copy of which contract is set forth as Exhibit 'A' attached to the deposition of Ben Holladay, as contained in volume 1 of the testimony herewith returned; and that on the 27th of November, 1867, the defendant S. G. Elliott, in the name of A. J. Cook, entered into a supplemental contract with said O. C. R. R. Co., East Side, modifying and changing said first contract, a true copy of which is attached to said deposition of Ben Holladay, marked Exhibit 'B.'

"Ninth—That on or about the 12th day of May, 1868, the defendant S. G. Elliott, in the name of A. J. Cook & Co., entered into another agreement, or contract, for the construction of the balance of said road from the end of the first 150 miles to the California line, being 210 miles more or less, a true copy of which contract is contained in Exhibit 'C,' attached to said deposition of Ben Holladay; and that on or about the 10th day of June, 1868, a supplemental agreement was entered into by the defendant S. G. Elliott, in the name of A. J. Cook & Co., with said O. C. R. R. Co. East Side, constructing and explaining the aforesaid agreement, a true copy of which is attached to said deposition of Ben Holladay, marked Exhibit 'D.'

"Tenth—That on the 2d day of May, 1867, said Albert J. Cook endorsed upon the first contract herein referred to of date April 23d, 1867, the following assignment:

" 'In consideration of the sum of one dollar to me paid by S. G. Elliott, of San Francisco, the receipt of

which is hereby acknowledged, I hereby transfer and assign forever all my right, title and interest in the within instrument.

" 'Witness my hand and seal this 2d day of May, A. D. 1867.

" 'Albert J. Cook.

" 'In presence of W. D. Litchfield.'

"And that thereafter said S. G. Elliott never had any other or further authority to use the name of said A. J. Cook, or had any further communication with him upon that subject.

"Eleventh—That at and prior to the time of making the said contract between A. J. Cook and said O. C. R. R. Co. East Side, referred to as Exhibits 'A' and 'B,' the defendant S. G. Elliott, fraudulently concealed from and misrepresented to the officers and Directors of said company the financial ability of A. J. Cook and his interest in said contracts.

"Twelfth—That in making said contracts said railroad company, relying upon the representations of the defendant S. G. Elliott, believed said Cook to be a man of large means, able to carry out his contracts and to be the real party interested in the contracts.

"Thirteenth—That on the 20th day of May, 1867, the defendant S. G. Elliott, assigned to N. P. Perrine seven-twentieths of said first mentioned contract of date of April 23d, 1867, for the sum of $3000 coin, which was paid by Perrine to said Elliott, and on said day said

Perrine and Elliott formed a copartnership under the name of A. J. Cook & Co., as equal partners, a true copy of which article of partnership is set forth in the deposition of S. G. Elliott returned herein on pages 90, 91 and 92 of the printed deposition.

"Fourteenth—That on or about the 29th day of May, 1867, the defendant S. G. Elliott assigned to James P. Flint one-tenth interest in said contract of date April 23d, 1867, a copy of which assignment is in the same printed deposition of S. G. Elliott on pages 100 and 101.

"Fifteenth—That during the latter part of March, 1868, the defendant sold and assigned to T. R. Brooks two-twentieths of said first contract, and to Gardner Elliott one-twentieth interest therein for $1,500 coin, which sum was paid to said defendant.

"Sixteenth—That on or about the ——— day of April, 1868, the defendant S. G. Elliott sold and assigned to Ignatz Frohman seven-twentieths of said contract of date April 23d, 1867, for the sum of $14,000 coin, and that said Frohman paid to said Elliott the sum of $13,300 coin, thereon, and that on said date said Frohman and said Elliott formed a partnership under the firm name of A. J. Cook & Co., a true copy of which articles of partnership are set forth on pages 307 and 308 of the printed deposition of said defendant Elliott.

"Seventeenth—That prior to the date of the formation of the copartnership herein the defendant Elliott had assigned one-twentieth in said contract to some other

person, whose name is not disclosed by the evidence, but said S. G. Elliott held control of the same, as he did of the two-twentieths assigned to J. P. Flint, referred to in the fourteenth finding, which control did not give him any interest therein.

"Eighteenth—That at the date of the formation of said partnership said persons still held said interest, respectively, in said contracts as aforesaid, but the plaintiff Ben Holladay held an agreement for the purchase of the interest of said Perrine, at the option of said Holladay, and that after the formation of the said partnership the plaintiff purchased said interest of said Perrine and Frohman.

"Nineteenth—That at and prior to the execution of the articles of partnership the defendant S. G. Elliott represented to the plaintiffs that he was a civil engineer, and that he was competent and well qualified to fill the position and to perform all the duties pertaining to the office of superintendent of the work of constructing, equipping and operating the said railroad under the said contract.

"Twentieth—That said representations were a moving cause in the formation of said partnership, and the sole reason of said Elliott being appointed to said position, plaintiff relying solely upon his representations therein.

"Twenty-first—That said defendant S. G. Elliott, at the time of the formation of said partnership was, and is wholly incompetent and not qualified to perform the

duties of such position.

"Twenty-second—That at and prior to the formation of said partnership, S. G. Elliott represented to the plaintiffs that the work of construction was so far advanced that it could be completed, ready for the ties from Portland to Salem, for the sum of $40,000 coin, and that plaintiffs relied upon such representations in forming said copartnership; that it cost for work done after said partnership was formed to finish said twenty miles ready for the ties $175,653 55-100.

"Twenty-third—That prior to and at the formation of said partnership the defendant S. G. Elliott represented to these plaintiffs that the said firm of A. J. Cook & Co. had received $775,000 of the bonds of the said O. C. R. R. Co. East Side, and $1,000,000 of the stock called interest-bearing preferred non-assessable stock, which had not been transferred to said company, all of which he represented he could control and would turn over to said firm upon its formation, except $39,400 bonds, which he represented to have negotiated for machinery.

"Twenty-fourth—That at the time of the formation of said partnership the defendant S. G. Elliott did not have control of all said stock and bonds, but had given away and sold for small sums $470,000 of said stock as follows: J. P. Flint, $100,000 of said stock; C. Temple Emmet, $100,000 of said stock; T. R. Brooks, $100,000; S. F. Elliott, $100,000; Gardner Elliott, $40,000; B. F. Avery, $10,000; E. B. Sadler, $100,000; John J. Kro-

mer, $10,000; Gen. B. F. Pratt, $10,000; Parker, $10,000 of it. That of said bonds that he had placed $22,800 in the hands of W. H. Martin, who refused to deliver the same up until he was paid for service in trying to negotiate them, and that a bond for $500 had been placed in the hands of one Brick who claimed to own the same.

"Twenty-fifth—That said S. G. Elliott, for said stock so disposed of, had received money as follows: S. F. Elliott, $7,500 coin; Parker, $500 currency; J. F. Emery, $350 coin; and that in account of money advanced to S. F. Elliott, for money advanced to A. J. Cook & Co. he should be charged with these amounts.

"Twenty-sixth—That among the property purchased for use on said railroad were four locomotives, which were sold by S. G. Elliott in San Francisco at a net profit of $4,000 in currency, and that in said account with A. J. Cook & Co. defendant S. G. Elliott should be charged with that sum.

"Twenty-seventh—That at or prior to the formation of said copartnership there were several suits or actions instituted and pending against the said O. C. R. R. Co. East Side, designed to test the right of the said O. C. R. R. Co. to use the corporate name.

"Twenty-eighth—That by reason of said suits and the cloud cast over the company, its bonds were of no value in the market.

"Twenty-ninth—That the stock called preferred interest-bearing non-assessable stock, was illegal and of no value.

"Thirtieth—That said contracts and none of them were, at the formation of said copartnership, or ever since have been of any value.

"Thirty-first—That prior to the formation of said co-partnership the Congress of the United States by an Act entitled 'An Act granting bonds to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, Oregon, approved July 25, 1866,' granted to such company organized under the laws of this State, as the Legislature might designate for the purpose of aiding in the construction of a railroad and telegraph line from Portland, Oregon, southward to the California line, every alternate section of the public lands (not mineral) designated by odd numbers, to the amount of twenty alternate sections per mile, ten on each side of said railroad line; and when any of said alternate sections or part of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, the right of way left to said company to select other land designated by odd sections nearest to and within ten miles of the limits of said first named alternate sections; and that among other things said grant was conditional that said railroad company should complete the first 20 miles of its road and put the same in running order on or before December 25th, 1869.

"Thirty-second—That the Legislative Assembly of the State of Oregon, by a joint resolution passed at the regular session thereof 1866, had designated the said O. C. R. R. Co. West Side, as the company to receive said

grant under said Act of Congress.

"Thirty-third—That the Legislative Assembly of Oregon at its regular session held in 1868, after the formation of the copartnership herein, by a like joint resolution designated the said O. C. R. R. Co. East Side as the company to receive said land grant.

"Thirty-fourth—That after the execution of said articles of copartnership, September 12th, 1868, the said firm entered upon the work of constructing the said road under said contract, the defendant S. G. Elliott acting as general superintendent of construction until October 4th, 1869.

"Thirty-fifth—That by reason of the incompetency and mismanagement of the said S. G. Elliott, the work on said first 20 miles was so delayed thereon that it could not have been completed under his superintendency within the time required by the Acts of Congress.

"Thirty-six—That by reason of the incompetency and mismanagement of the defendant S. G. Elliott as general superintendent of construction, work was delayed on said first 20 miles so far that the greatest portion of said work had to be done at increased cost on account of the heavy and bad weather, and that by reason thereof the cost of completing said first 20 miles was increased at least $10,000, and that plaintiffs have been damaged in that sum by his incompetency and mismanagement.

"Thirty-seventh—That on the 4th of October, 1869,

the plaintiff Ben Holladay, acting for himself and the plaintiff C. Temple Emmet, caused a notice to be delivered to the defendant S.G. Elliott, of which the following is a copy:

" 'Office Ben Holladay & Co.,)
" 'Portland, Oregon, Oct. 4th, 1869.)

" 'Mr. S. G. Elliott: As your services as general superintendent in the construction of the Oregon Central Railroad are no longer required, Mr. John F. Kidder has been employed to take charge of the work as constructive engineer.

"Respectfully, Ben Holladay & Co.'

"Thirty-eighth—That thereafter the said S. G. Elliott ceased to act in any manner, as a member of said firm in any capacity.

"Thirty-ninth—That thereafter the plaintiffs proceeded to complete the first 20 miles of said road, and by great exertion and diligence completed the same on the 24th day of December, 1869.

"Fortieth—That if the said S. G. Elliott had remained in charge as general superintendent said first 20 miles would not have been completed within the time specified by the Act of Congress.

"Forty-first—That nothing whatever was done by either of the parties thereto under either of the contracts referred to as Exhibits 'C' and 'D' heretofore.

"Forty-second—That on the 24th of December, 1869, work was suspended by the firm of Ben Holladay

& Co., except as to taking care of the property and disposing of the same.

"Forty-third—That there were no profits ever realized by the firm of Ben Holladay & Co.

"Forty-fourth—That said contracts were of no value to said firm or to any firms, and that to have fulfilled them would have entailed so great financial loss upon the contractors as to render the same impracticable as a business transaction.

"Forty-fifth—That on the 28th of March, 1870, the said contracts were by the said O. C. R. R. Co. East Side, duly canceled by the consent of the plaintiffs acting as the firm of Ben Holladay & Co.; and all the bonds and stock of said company that had come into the possession of said firm of Ben Holladay & Co. were delivered up and canceled, and on the said 28th of March, 1870, said company was dissolved.

"Forty-sixth—That all the assets of the firm of Ben Holladay & Co. (aside from the bonds, stock and contracts above referred to) did not exceed in value the sum of $10,000 (ten thousand dollars).

"Forty-seventh—That the total amounts paid out by the firm of Ben Holladay & Co. in the construction of the O. C. R. R. Co. under said contracts, exclusive of the amount paid to A. J. Cook & Co., was $596,510 55-100, which money was all paid out by the plaintiffs and was repaid to them by the said O. C. R. R. Co. upon the cancellation of said contracts.

"Forty-eighth—That after the execution of said partnership and prior to the commencement of this action, the defendant S. G. Elliott sold and assigned to the defendant T. R. Brooks, one-fortieth interest in said partnership, being one-sixth of his interest therein, and to the defendant Gardner Elliott another fortieth interest therein, leaving the defendant and S. G. Elliott only four-fortieths interest in said partnership.

"Forty-ninth—That neither party to said partnership was importunate to have the same formed, but the same was willingly entered into by each of said parties.

"Fiftieth—That since the commencement of this suit the plaintiff Ben Holladay has purchased the said interest from T. R. Brooks and Gardner Elliott and is now the owner thereof.

"Fifty-first—That the accounts of the parties stand as follows: Total amount expended on the road by A. J. Cook and A. J. Cook & Co., including $6,000 for services and expenses to April 23d, 1858, $64,109.82. The amount of expenses charged in this item of $6,000 were not more than $500, leaving a charge of $5,500 for services which plaintiff did not agree to pay. The amount received from the sale of $39,400 bonds in currency at par, gold being 140, would make in gold $28,142.85, with which he should be charged. He received from Ignaz Frohman $14,000, less $700 drawback, leaving $13,300 with which he should be charged. Received from N. P. Perrine $3,000; received from Gardner Elliott, $1,500; received from S. F. Elliott, $1,500; received

from J. S. Emery say $350; received from Parker $500 in currency, gold being 140 make $357; borrowed from Trust Company in San Francisco, paid by plaintiffs, $6,560; profits on locomotives, $4,000 in currency, gold being 140, $2,859; making a total of $63,006 to be deducted from the amounts on the road, would leave $1,103 with which plaintiffs should be charged on their letter or agreement dated Sept. 12th, 1868, as the money advanced by S. G. Elliott to the firm of A. J. Cook & Co., which plaintiffs had agreed to pay. Plaintiffs should also be charged with his salary to Oct. 4th, 1869 twelve (12) months and twenty-two (22) days, at 500 per month, $6,366.50; also, one-tenth of the assets of B. H. & Co. $1,000, would leave a total of $8,469.52, with which plaintiffs should be charged. Defendant S. G. Elliott received over and above his traveling expenses, from the plaintiff, $9,000—would leave the defendant S. G. Elliott upon a proper accounting between him and the plaintiffs, indebted to them in the sum of $530.45.

"Fifty-second—That on or about the 4th day of Nov. 1869, the defendant S. G. Elliott made a bill of sale to the defendant J. B. Rogers of all his household furniture and a lot of personal property. That said bill of sale was simply between the parties to facilitate the sale of said property to other purchasers by said Rogers, in the contemplated absence of Elliott, and was void as to the creditors of said Elliott.

"J. C. Moreland, Referee.

"I also find the following

"CONCLUSION OF LAW

"1st. That said Oregon Central Railroad Company was illegally organized, and its stock called non-assessable interest bearing preferred stock, was void.

"2d. That the plaintiffs had no legal right to discharge the defendant S. G. Elliott from the position of general superintendent, but his incompetency and delay in prosecuting the work precluded him from recovering damages for such discharge.

"3d. That the misrepresentations of the defendant S. G. Elliott as to his qualifications for the position of general superintendent of construction under the said contracts, his incompetency for said position and his sale of said interests in said partnership to T. R. Brooks and Gardner Elliott, entitle the plaintiffs to a decree dissolving said copartnership as of Nov. 5th, 1869, the date of the commencement of this suit, and a settlement of the partnership accounts as of that date.

"4th. That plaintiffs had judgment and decree against the defendant S. G. Elliott for the sum of $530.48, balance of account, and the sum of $10,000 damages to be apportioned by plaintiffs according to their respective interests.

"5th. That neither party received of the other any costs or disbursements.

"All of which is respectfully submitted.

"J. C. Moreland, Referee.

"And the Court having taken the same under advise-

ment, after fully considering the allegations and proofs of the parties and the finding of said Referee, finds:

"1st. The 20th finding of said referee should be modified in this—said representation of S. G. Elliott of his competency was not the sole cause of his being appointed superintendent of said road, but his position in being then in control of said road was one cause of his being so appointed.

"2d. That findings 35th and 36th are not supported by the evidence.

"3d. The 40th finding is modified so as to read as follows: The incompetency of S. G. Elliott as superintendent of said road made it necessary and proper for Ben Holladay & Co. to suspend him from that position and trust and to substitute another man in his place.

"4th. The 42d finding is not supported by the evidence.

"5th. The 2d finding of said referee as a conclusion of law is rejected as erroneous.

"6th. The Court further finds as a conclusion of law that from the fact found by said referee as modified as aforesaid, that the plaintiffs are entitled to a decree dissolving partnership, and that the defendant S. G. Elliott is indebted to the firm of Ben Holladay & Co. on account, the sum of $530; that of this sum plaintiffs are entitled to 9-10 dollars, equal to the sum of $477 (dollars), for which sum they are entitled to a decree, but not for costs and disbursements.

"It is therefore ordered and decreed by the Court that the said firm of Ben Holladay & Co. be dissolved, and that the plaintiffs have and recover from S. G. Elliott the defendant, the said sum of four hundred and seventy-seven dollars ($477), to be distributed between said plaintiffs—twenty-eight fortieths to Ben Holladay, and ten fortieths to C. Temple Emmet—and that they have execution therefor.

"R. P. Boise, Judge."

FINDINGS AND DECREE.

"At a Supreme Court begun and held at the City of Salem, County of Marion, State of Oregon, on Monday, the 7th day of July, A. D. 1879.

"Present: Hon. James K. Kelly, Chief Justice; Hon. R. P. Boise, Associate Justice; Hon. P. P. Prim, Associate Justice; P. H. D'Arcy, Clerk; Joseph A. Baker, Sheriff and Ex-Officio Bailiff.

"WHEREUPON on Fr'day, the 15th day of August, 1879, the same being the 28th Judicial Day, the following proceedings were had:

"Appeal from Marion County.

"Ben Holladay and C. Temple Emmett, Respondents,

vs.

"S. G. Elliott, Appellant.

"Now on this day the above entitled suit having heretofore been tried and submitted to the Court and taken under advisement, and the Court being now fully advised as to what final decree should be entered therein,

the Court finds:

"First, that the contract of co-partnership of Ben Holladay & Co., set forth in the complaint, was entered into without fraud or misrepresentation upon the part of either the appellant or the respondent.

"Second, that the bonds of the Oregon Central Railroad Company, mentioned in the pleadings, and the preferred interest-bearing non-assessable stock issued by the Oregon Central Railroad Company of Salem were illegal and of no value.

"Third, that on the 22nd day of April, 1867, John H. Moores, J. S. Smith, George L. Woods and others, filed articles of incorporation in the office of the Secretary of State and in the office of the County Clerk of Marion County, to incorporate the Oregon Central Railroad Company. That the capital stock was fixed at $7,250,000, divided into 72,500 shares of $100 each, and on the same day stock books were opened, when six shares of stock were subscribed by six different persons; then followed this subscription: 'Oregon Central Railroad Company, by George L. Woods, Chairman, 70,000 shares, $7,000,000.' That on the same day directors and other officers were elected, and on the 23rd day of April, 1867, the O. C. R. R. Co. thus organized; entered into the contract with A. J. Cook to construct 150 miles of its road, from Portland south through the Willamette Valley, for $5,250,000, to be paid in first mortgage bonds of the company payable in twenty years, and to be taken by the contractor, A. J. Cook, at par; That payments of

eighty per cent were to be made by the O. C. R. R. Co. for the work done by A. J. Cook; to be paid every month as the work progressed; That the O. C. R. R. Co. also agreed at the same time to issue $2,000,000 of preferred stock unassessable and bearing interest at the rate of seven per cent per annum, and deliver the same to A. J. Cook immediately after signing the contract, and that the common stock of the company should be offered to the people of Oregon at ten cents on the dollar; That afterwards the appellant, who became the owner of the A. J. Cook contract, associated others with him under the firm name of A. J. Cook & Co., and on the 27th day of November of that year entered into a supplementary agreement with the O. C. R. R. Co. whereby in consideration of materials bought for the construction of the road, the company agreed to issue and deliver to A. J. Cook & Co., $775,000 of first mortgage bonds on its railroad and franchises, and the bonds were issued accordingly. That the $2,000,000 of preferred stock specified in the agreement of April 23rd, had already been issued and delivered by the O. C. R. R. Co. to A. J. Cook & Co. That one million dollars of this preferred stock was given back to the directors of the company, according to a private understanding with them, that they were to have it to be used by them in procuring the necessary legislation in Oregon to promote the interests of the corporation, and that this delivery to the directors of $1,000,000 left still $1,000,000 of the preferred interest-bearing non-assessable stock in the possession of A. J. Cook & Co. That this is the stock and these are

the bonds, less $68,000, which was transferred by A. J. Cook to the firm of Ben Holladay & Co., upon the formation of the copartnership.

"Fourth, that the attempt to subscribe 70,000 shares to the stock of the O. C. R. R. Co. by the corporation itself through a person styling himself chairman, was done simply to evade the liability which the law imposes on all persons who subscribe to the capital stock of corporations.

"Fifth, that such subscription to the capital stock of said company by the corporation itself was illegal and void.

"Sixth, that such attempted organization of said company, based upon said illegal and void subscription to its capital stock, was illegal and void, and the said corporation was not organized according to law.

"Seventh, that it was under said illegal and void organization of said company that the contracts set forth in the complaint were executed by said company, and the stock and bonds therein mentioned were issued.

"Eighth, that said contracts were of no value.

"Ninth, that upon the formation of the copartnership of Ben Holladay & Co. in September, 1868, the work of constructing the railroad under the contracts of A. J. Cook and A. J. Cook & Co. was continued under the appellant as general superintendent, and was prosecuted with reasonable vigor until December, when it was partially suspended, and from that time until July, 1869, but little work was done. That during the month of

May, only nine, and July only eleven men were employed on the whole line of the road from Portland to Salem. That the appellant was absent in the Atlantic States during the preceding winter and returned too late to commence operations on the road during the months when work could have been prosecuted with the greatest benefit to the firm and the best season of the year for profitable labor in railroad building was suffered to go by and the appellant was discharged by the firm of Ben Holladay & Co. from their employment as general superintendent and for alleged inefficiency, and after he ceased to act as superintendent on the 4th day of October, 1869, a largely increased force of laborers was placed on the road, far higher wages were paid for workmen, and in this way the section of twenty miles was completed on the 24th day of December, 1869. That one of the chief causes why the work progressed so slowly during the spring of 1869 was the inability to procure the funds necessary to carry it on more vigorously.

"Tenth, that suits had been commenced in the U. S. Circuit Court and in the Circuit Court of this State against the O. C. R. R. Co. to test the legality of its existence as a corporation, and they had so far progressed as to foreshadow its overthrow. That Joseph Gaston, the president of a rival corporation of the same name, known as the Oregon Central Railroad Company (west side), had issued circulars and sent them to bankers and brokers in the East, setting forth that 'the corporation was a humbug and its bonds were worthless.' That it was known that the company was hopelessly in-

solvent; that Ladd & Tilton had presented to it for payment certain interest coupons which were protested for non-payment, and that there were no subscribers to the capital stock of the corporation from whom any money could be collected to defray the rapidly accumulating interest on the bonds and its preferred interest-bearing stock, and said bonds were worth nothing in the money markets of the world, and that to have gone on and attempted to complete the road under the contracts of A. J. Cook & Co. with that corporation would have been simply an act of folly, and would have bankrupted not only Ben Holladay & Co. but financially ruined every member of the firm, and that it was an impracticable undertaking to construct the railroad under the copartnership of Ben Holladay & Co. and for that reason a dissolution of the co-partnership should be decreed.

"Eleventh, that at the time of entering into the copartnership the firm of Ben Holladay & Co., in consideration of the transfer, to-wit of the property of A. J. Cook & Co., agreed to pay the indebtedness of that company, including a debt due to the appellant, then estimated at $21,000. That sometime after the formation of the copartnership Ben Holladay & Co. gave the appellant a written instrument to this effect, which was antedated so as to conform to the date of the agreement, which is as follows:

'Office of Ben Holladay & Co.

Portland, Ore., Sept. 12, 1868.

S. G. Elliott, Portland, Dear Sir: On our purchase

this date from A. J. Cook and A. J. Cook & Co. of the pending contracts with the Oregon Central Railroad Company for the construction of a railroad from Portland to the California line, it is understood that we are to pay you the money furnished by you to the firm of A. J. Cook & Co. and standing to your credit on their books. This money is stated by you to amount to about $21,000. When the accounts are fully made up and the balance correctly ascertained you will be entitled to our obligation for the correct amount. Respectfully yours, Ben Holladay & Co.'

"That this writing was accepted by the appellant, and that the amount of money furnished to the firm of A. J. Cook & Co. by the appellant, Elliott, was $21,000, and that said appellant is now entitled to that sum with interest, less the amount which was paid to him thereon by Ben Holladay & Co.

"Twelfth, that prior to the bringing of this suit the firm of Ben Holladay & Co. had paid to said Elliott, on account of said sum of $21,000, the sum of $8,000, and that there is due from the said firm of Ben Holladay & Co. to the appellant the sum of $13,000 with interest thereon since September 12, 1868.

"Thirteenth, that at the time this suit for a dissolution of the copartnership was commenced, the assets of the firm of Ben Holladay & Co. consisted in part of a section of twenty miles of railroad, then nearly completed. That by the terms of the contract entered into between the O. C. R. R. Co. and A. J. Cook & Co. the latter firm was to

receive $32,000 per mile for the construction and equipment of that portion of the road, or $640,000 for the twenty miles, which sum was to be paid to the firm of Ben Holladay & Co. under the contract of A. J. Cook & Co. in bonds of the O. C. R. R. Co. which were of no value for reasons already stated, and that the Oregon Central Railroad Company, having no lawful organization, the respondents appropriated and converted that section of the railroad to their own use and benefit, and subsequently sold it to the Oregon & California Railroad Company, a new corporation organized to complete it, and the amount of money necessarily expended in constructing that section of the road cannot be satisfactorily ascertained from the evidence in the case. That inasmuch as the respondents appropriated that section of the road, as well as all the work on the other portions to their own use, without the consent of appellant, it should be presumed that it was worth to them what it cost to construct it, including not only what they paid out upon it, but also the unpaid balance of $13,000, which A. J. Cook & Co. had expended upon it, and which Ben Holladay & Co. assumed to pay to the appellant when the co-partnership was formed, and that having terminated that copartnership and excluded the appellant from any participation in the settlement of its affairs and the disposal of its assets, the respondents should be held liable to pay the debts of the firm, as well as those due to themselves, as the amount due to the appellant; and the Court further finds that besides the railroad property belonging to Ben Holladay & Co. that firm had the machine shops,

also saw mills, wagons, carts, horses, etc. which the respondents also appropriated to their own use and subsequently transferred to the O. & C. R. R. Co., worth in the aggregate $19,500, of which the appellant was entitled to four-fortieths or one tenth, that being the interest which he had in the copartnership at the time this suit was commenced, making his share therein the sum of $1950.

"Fourteenth, that though in law the firm of Ben Holladay & Co. had no title to the lands granted by Congress to aid in the construction of the Oregon Central Railroad, yet in equity it was entitled to them, as all these lands were earned by the money and labor of Ben Holladay & Co., and were in fact afterwards transferred to the O. & C. R. R. Co., and whatever may have been realized by the sale must in equity be regarded as part of the assets of that firm, and although the partnership was terminated by the respondents before the lands for the first section were fully earned, yet they will not be permitted to exclude the appellant from his rightful share in the lands by affecting a dissolution of the copartnership a few weeks before the title to them became perfected. That nearly all the valuable lands embraced within the limits of the Railroad Grant for the first 20 miles had already been disposed of by the U. S. Government before the grant was made, and that up to September, 1868, there had been selected and patented to the O. & C. R. R. Co. for the first section of 20 miles, 32,267.36 acres, and about the same number of acres more could be selected whenever the surveys should be made.

That these lands were worth in the aggregate about 25 cents per acre, and that all the lands patented and unpatented, amounting to about 64,534 acres, were worth $16,133, of which sum the appellant ought to have one-tenth or $1,613.

"Fifteenth, that upon a fair settlement of the partnership transactions the respondents are justly indebted to the appellant in the following sums: Nine-tenths of the balance of A. J. Cook & Co. indebtedness unpaid by Ben Holladay & Co., $11,700, interest since September 12, 1868, $12,622.70; appellant's interest in machine shops, sawmills, etc., $1950, interest since November 5, 1869, $1886; equitable shares in land grant $1613; eight years interest on same $1280. Total $31,051.70. That of this sum the respondents should pay in proportion to the interest which they had respectively in the copartnership of Ben Holladay & Co., that is the respondent Holladay is to pay twenty-four parts or $21,909.46, and respondent Emmett ten parts or $9,132.08.

"It is therefore ordered, considered and decreed that the report and findings of law and fact of the referee and of the Court below, in so far as they are not changed and modified by the foregoing findings and conclusions, be and they are hereby confirmed, and that so far as they conflict therewith that they be and they are hereby in all things set aside and modified.

"It is further ordered and decreed by the Court that the copartnership of Ben Holladay & Company in the complaint mentioned be and the same is hereby dissolved

as of the commencement of this suit, and that said respondents be and they are charged with all the assets of said firm in accordance with the findings aforesaid, and that the appellant, Simon G. Elliott, have and recover from the respondent Ben Holladay the sum of $21,919.46 and that he also have and recover of and from the respondent, C. Temple Emmett, the sum of $9,-132.08.

It is further ordered and decreed that all the costs and disbursements incurred by the respondents and appellant in the Circuit Court and in this Court shall be paid by them in proportion to the interest which they have respectively in the copartnership; that is, the appellant shall pay one-tenth of such costs and disbursements to be taxed, and the respondents shall pay the remaining portion of such costs and disbursements; that the costs and disbursements in the court below shall be taxed there; that the costs and disbursements in this court are allowed, taxed at $359.10, and that execution issue therefor.

"It is further ordered that this cause be remanded to the court below for such further proceedings as are by law required.

"STATE OF OREGON,
"County of Marion } ss.

"I, J. C. MORELAND, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copy of Decree has been by me compared

with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record, and in my office and custody.

"IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Salem, Oregon, this 18th day of September, 1911.

(SEAL) J. C. Moreland, Clerk."

Whereupon WILLIAM SINGER called as a witness on behalf of defendants, and being duly sworn, testified that he is a member of the law department of the Southern Pacific Company in San Francisco, and as such has charge of all suits and proceedings in courts and land offices involving questions of title to lands or rights of way granted by the so-called Oregon and California land grant, California and Oregon land grant, Central Pacific land grant, and Southern Pacific Railroad Company land grant. He is also an attorney in such matters for the Southern Pacific Company. In the United States land office, pursuant to the rules of practice of that office, he authorizes the appearance of attorneys over his signature as general land attorney for the particular company represented. He commenced this employment in the year 1878, as a land office attorney for the California and Oregon land grant, then owned by the Central Pacific Railroad Company, as attorney for B. B. Redding, land agent of that company. In 1884, or 1885, he became land attorney for the Central Pacific Railroad Company's land grant, and for the entire land grant of the California and Oregon Railroad Company,

both in land office proceedings and in courts, other than federal courts. In 1894 there was added to his jurisdiction, federal cases for the California and Oregon, Oregon and California, Central Pacific and Southern Pacific Railroad Company's land grants. In 1888, when William H. Mills was appointed land agent of the Oregon and California land grant, witness investigated the title of that company to its lands in Oregon, and reported that to William H. Mills. After the year about 1884 or 1885 until 1894, he owed no allegiance to the chief counsel of the companies but acted as attorney for William H. Mills, as he understood it, under authority from Mr. C. P. Huntington, that he was such attorney for William H. Mills.

Referring to the form of deed described in Exhibits 11 and 12 to the Stipulation as to the Facts in this case, witness testified that upon investigation of the operation of the land department of the Oregon and California land grants, he found that warranty deeds were being given for patented and unpatented lands. He recommended to Mr. Mills in 1889 or 1890 that the issuance of warranty deeds be discontinued and that a deed granting and conveying the lands be given to patented lands, and that a deed quitclaiming all the right, title and interest which the company had or might thereafter acquire, be given to unpatented lands for the Oregon and California land grants, and his recollection is that he drafted the deeds set forth in those exhibits. This is confirmed by the peculiar phrase of the granting clause, "Grant and convey" not having been used, so far as his

observation goes, by any conveyancer but himself, and the other form of deeds "Remise, release and quitclaim all right, title and interest which the company owns or may hereafter acquire" having originated, he believes, with him; his belief is that those forms were drawn by him, sent by Mr. Mills to Secretary Andrews, then Secretary of the Oregon and California Railroad Company, with instructions to adopt and use them thereafter. Those forms of deeds comply substantially with the forms of deeds about that time drafted by him for use in conveying lands of those land grants, for which William H. Mills was land agent. The primary object of these forms of deeds was to standardize the forms of deeds, although an important consideration with him was to dispense with warranty deeds, which, in his experience as a railroad attorney, were not given by any railroad company other than the Oregon and California. There was no purpose by these instruments, or the adoption of these forms, to anticipate or meet any contention or claim now made by the United States in this suit as to the provisions of Section 4 of the Act of May 4, 1870, or the Act of April 10, 1869. His recollection is that prior to that time he had given a written opinion that the proviso in the Act of May 4, 1870 was a covenant and not a condition and that the Act of April 10, 1869 imposed no covenant if it had any effect at all. In fact, prior to the commencement of the case of Oregon & California Railroad Company against Eaton and the answer filed therein, they had attached no significance whatever to the proviso referred to either in the Act of

May 4, 1870 or the Act of April 10, 1869. It was his understanding always, and he believes it to be true, that Mills, during the lifetime of C. P. Huntington, acted as supreme executive officer in land grant matters, and did not submit forms of deeds to the consideration of anybody but witness and upon the approval of witness Mills passed them up to the secretaries of the companies for adoption.

Witness recognized what purports to be a certified copy of letters dated May 7, May 23, 1870, and May 20, 1872. The letter of May 20, 1872 purports to be a certified copy of a letter from Willis Drummond, Commissioner, to Honorable C. Delano, Secretary of the Interior, which letter refers to certain papers filed in his office by the Honorable George H. Williams, Attorney General, for the purpose of obtaining a construction by the department, of the proviso of the Act of Congress approved April 10, 1869, Statute, Volume 16, page 47, amendatory to the Act of July 25, 1866, Statute, Vol-16, page 239, etc., as an apparent certified copy under the seal of the general land office, marked as Defendants' Exhibit No. 373. Whereupon the same was offered and received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified as such.

Whereupon witness was shown Defendants Exhibit 374, purporting to be a certified copy of a form of deed and acknowledgment from the European and Oregon Land Company, together with letter of date January 23rd, 1874, signed I. R. Moores, Land Agent, together

with a letter of Willis Drummond, Commissioner, to I. R. Moores, Land Agent, of date March 13, 1874, all certified by the recorder of the general land office under date of April 11, 1912, and the seal of said general land office affixed, and witness recognized the same as so certified. Whereupon defendants offered and there was received in evidence Defendants' Exhibit No. 374 which is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness was shown Defendants Exhibit No. 375, purporting to be correspondence between the general land office and the Oregon and California Railroad Company, and therewith certified copies of executed deeds by Milton S. Latham and others, to the United States, Oregon and California Railroad Company, Farmers Loan & Trust Company, to the United States, and approved by R. Koehler, Receiver, in the suit of Lawrence Harrison, et al, against the Oregon & California Railroad Company, et al; from the Oregon and California Railroad Company to the Union Trust Company of New York, and to the United States, all relating to lands claimed by the United States to have been erroneously patented, and which documents purport to reconvey the title to the United States, together with the correspondence transmitting the same, and all being certified of date April 11, 1912 by the recorder of the general land office, under the seal of that office, and witness recognized that as a duly certified copy of these documents.

Whereupon defendants offered and there was received in evidence Defendants' Exhibit 375, which is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness was shown and recognized as a duly certified copy, a letter of the Assistant Attorney General, Walter H. Smith, to Secretary Delano, of date May 5, 1871; a letter of Secretary Delano to Attorney General Akerman of date May 8, 1871; a letter of Attorney General Akerman of date May 9, 1871 to Secretary Delano, and certain other correspondence connected therewith, and marked Defendants' Exhibit No. 376.

Whereupon defendants offered and there was received in evidence Defendants Exhibit No. 376, which is hereinafter set out and described and made a part of this statement of the evidence, and identifid as such.

Whereupon witness was shown a printed copy of an opinion of Attorney General Brewster, dated June 15, 1882, addressed to Secretary of the Interior H. M. Teller, being on pages 35 to 39 inclusive of Executive Document No. 29, 47th Congress, Second Session.

Whereupon defendants offered and there was received in evidence and is hereinafter extended in the record and is as follows:

"DEPARTMENT OF JUSTICE,

Washington, D. C., June 15, 1882.

"Sir: By a letter dated the 5th of January last, your "predecessor submitted to me a number of questions aris-

"ing upon an application of the New Orleans Pacific "Railway Company for certain lands claimed under the "land grant made to the New Orleans, Baton Rouge and "Vicksburg Railroad Company by the act of Congress of "March 3, 1871, chapter 122.

"The land grant mentioned is contained in the twen- "ty-second section of that act, which provides:

"That the New Orleans, Baton Rouge and Vicks- "burg Railroad Company, chartered by the State of "Louisiana, shall have the "right to connect, by the most "eligible route to be selected by said company, with the "said Texas Pacific Railroad at its eastern terminus, and "shall have the right of way through the public land to "the same extent granted hereby to the said Texas Pa- "cific Railroad Company; and in aid of its construction "from New Orleans to Baton Rouge, thence by the way "of Alexandria, in said state, to connect with the said "Texas Pacific Railroad Company at its eastern ter- "minus, there is hereby granted to said company, its suc- "cessors and assigns, the same number of alternate sec- "tions of public lands per mile, in the State of Louisiana, "as are by this act granted in the State of California to "said Texas Pacific Railroad Company; and said lands "shall be withdrawn from market, selected, and patents "issued therefor, and opened for settlement and pre- "emption, upon the same terms and in the same manner "and time as is provided for and required from said "Texas Pacific Railroad Company, within said State of "California; PROVIDED, That said company shall

"complete the whole of said road within five years from "the passage of this act."

"The eastern terminus of the Texas Pacific Rail-"road, as fixed by the same act, was a point at or near "Marshall, Tex.

"The New Orleans, Baton Rogue and Vicksburg "Railroad Company was incorporated by an act of the "legislature of Louisiana passed December 30, 1869, "which authorized it to construct and operate a railroad " 'from any point on the line of the New Orleans, Jack-"son and Great Northern Railroad, within the parish "of Livingston, running from thence to any point on the "boundary line dividing the States of Louisiana and Mis-"sissippi,' the route here indicated lying east of the Mis-"sissippi River. It was also authorized to construct and "operate a branch railroad from its main line (above "described) to the City of Baton Rogue; and for the "purpose of connecting its railroad with the railroads of "other companies, &c., it was furthermore authorized 'to "construct, maintain, and use, by running thereon its "engines and cars, such branch railroads and tracks as "it may find necessary and expedient to own and use;' "and such branch railroads were, for all the purposes of "the act, to be deemed and taken to constitute a part of "the main line of its railroad within the State of Louis-"iana.

"On November 11, 1871, that company filed in the "General Land Office a map designating the general "route of a road projected thereby from Shreveport, by

"way of Alexandria, to Baton Rogue, and thereupon a "withdrawal of the public lands along the same was or- "dered, which became effective in December following.

"Subsequently by an act of the legislature of Louis- "iana, passed December 11, 1872, the same Company was "given 'full power and authority to commence the con- "struction of their road in the City of New Orleans or "Shreveport, or at any intermediate point on their line "of road, as may best suit the convenience of said com- "pany, and facilitate the speedy construction of a con- "tinuous line from the City of New Orleans to the City "of Shreveport, or perfect railroad communication with "the Texas Pacific Railroad, or any other railroad in "northwestern Louisiana, at or near the Louisiana State "line: PROVIDED, however, That the said Company "shall construct the line of its road between the City of "New Orleans and the City of Baton Rogue on the east "side of the Mississippi River, to the corporate limits "of the said City of Baton Rogue, or adjacent thereto.'

"In the mean time, by the act of Congress of May "2, 1872, chapter 132, the Texas and Pacific Railway "Company (formerly styled the Texas Pacific Railroad "Company) was 'authorized and required to construct, "maintain, control, and operate a road between Marshall, "Texas, and Shreveport, Louisiana, or control and oper- "ate any existing road between said points, of the same "guage as the Texas and Pacific Railroad.' The same "act further provided that 'all roads terminating at "Shreveport shall have the right to make the same run- "ning connections, and shall be entitled to the same

"privileges, for the transaction of business in connection "with the said Texas and Pacific Railway, as are granted "to roads intersecting therewith.'

"On February 13, 1873, a second map was filed in the "General Land Office by the New Orleans, Baton Rogue "and Vicksburg Railroad Company, designating the "general route of a road projected thereby from New "Orleans to Baton Rogue, and a withdrawal of the pub- "lic lands along the same was ordered, which took effect "in April, 1873. The route between those places, those "designated, lies on the east side of the Mississippi River. "That company has not constructed any part of its road, "either on the route between New Orleans and Baton "Rogue or on the route between the latter place and "Shreveport; nor, indeed, has there been a definite loca- "tion of its road anywhere between the points mentioned. "Nothing beyond the designation of the general route "thereof appears.

"Pursuant to a resolution of its board of directors, "adopted December 29, 1880, all the right, title, and "interest of that company in and to the aforesaid grant of "public lands made by the act of March 3, 1871, were "deeded to it by the New Orleans Pacific Railway Com- "pany. This action of the board of directors and offi- "cers of the former company was afterwards approved "and ratified by the stockholders thereof at a meeting "held in December, 1881.

"The New Orleans Pacific Railway Company was "originally incorporated under the general laws of the

"State of Louisiana in June, 1875. Its charter was sub-
"sequently amended by acts of the Louisiana Legisla-
"ture, passed February 19, 1876, and February 5, 1878.
"It is thereby authorized to construct a railroad "begin-
"ning at a point on the Mississippi River, at New Or-
"leans or between New Orleans and the parish of Iber-
"ville, on the right bank of the Mississippi, and Baton
"Rogue, on the left bank &c., or from any point within
"the limits of this State, and running thence toward and
"to the City of Shreveport,' which is made its northwest-
"ern terminus.

"The route of this company as projected is under-
"stood to extend from New Orleans to Baton Rogue,
"and thence by way of Alexandria to Shreveport. Be-
"tween New Orleans and Baton Rogue it lies on the
"west side of the Mississippi River; while the designated
"route of the New Orleans, Baton Rogue and Vicks-
"burg Railroad Company, between the same points, lies
"on the east side of that river. Between Baton Rogue
"and Shreveport its general course and direction corre-
"sponds, in the main, with the route designated by the
"last named company. It is throughout its entire length
"from New Orleans to Shreveport within the limits of
"the before-mentioned withdrawals of public lands.

"In October, 1881, the president of the New Orleans
"Pacific Railway Company made affidavit that three
"sections of its road were then completed and ready for
"examination by the government; whereupon a com-
"missioner was appointed to examine the same, the re-
"sult of whose examination appears in a report made by

"by him to the Secretary of the Interior, under date of "the 26th of that month. One of the sections embraces "68 miles of road, beginning on the west bank of the "Mississippi River, opposite New Orleans, and ending "near the town of Donaldsonville; another embraces 20 "miles of road near Alexandria; and the third embraces "50 miles of road terminating at Shreveport. For each "of these sections lands are claimed by that company "under the aforesaid land grant, as assignee of the New "Orleans, Baton Rogue and Vicksburg Railroad Com- "pany.

"No map of definite location of any portion of its "road has been filed, other than those of constructed por- "tions. It appears that in February, 1881, the New Or- "leans Pacific Railway Company purchased from Mor- "gan's Louisiana and Texas Railroad and Steamship "Company, the road constructed on the west bank of "the Mississippi River by the New Orleans, Mobile and "Texas Railroad Company, from Westmego to White "Castle, a distance of 68 miles, and that the same has "become a part of the main line of the road of the New "Orleans Pacific Railway Company.

"The following are the questions submitted:

"1. Was the grant to the New Orleans, Baton "Rogue and Vicksburg Railroad Company, a grant in "presenti?

"2. Had the New Orleans, Baton Rogue and Vicks- "burg Railroad Company, at the date of its alleged "transfer of land to the New Orleans Pacific Railway

"Company, such an interest in the lands, under said "act, as was assignable?

"3. Is the New Orleans Pacific Railway Company, "such a successor to or assignee of the New Orleans, "Baton Rouge and Vicksburg Railroad Company as is "contemplated by said act?

"4. Should it appear that the 68 miles of the New "Orleans, Mobile and Texas Railroad was constructed "prior to the act of March 3, 1871, granting lands to "aid in the construction of the New Orleans, Baton "Rouge and Vicksburg Railroad, can the New Orleans "Pacific Company (its assignee) claim any benefit from "the grant? Or in the case of such prior construction, "and the nonconstruction of any portion of the New Or- "leans, Baton Rouge and Vicksburg road, has the pur- "pose for which the grant was made failed, and the "grant consequently lapsed?

"5. If the New Orleans, Mobile and Texas road "was constructed, subsequently to the date of said act, "is so much of its road as is now owned by the New Or- "leans Pacific Company such a road as is contemplated "for acceptance by the president within the meaning of "said act, and may patents issue to the latter for lands "opposite to and co-terminus with such constructed por- "tion of road?

"These questions are accompanied by a request for "an opinion upon such other questions of law as may "suggest themselves touching the transfer of said land "grant, to which reference is above made.

"Of the above stated questions the first three may be "considered together in connection with the following "inquiry, which presents itself at the outset, whether "the assent of Congress to the transfer made by the New "Orleans, Baton Rouge and Vicksburg Railroad Com- "pany of all its interest in said land grant to the New "Orleans Pacific Railway Company is necessary (by rea- "son of anything in the provisions of the grant itself) "to entitle the latter company to the benefit of said grant "in aid of the construction of the road projected by it.

"The act of March 3, 1871 passed to the New Or- "leans, Baton Rouge and Vicksburg Railroad Company "a present interest in a certain number of alternate sec- "tions of public lands per mile within the limits there "prescribed. Its language is 'there is hereby granted "to the said company' the number of alternate sections "mentioned; words which import a grant in presenti, "and not in future, or the promise of a grant (97 U. S. "Rep., 496) But the grant thus made is in the nature "of a float. It is of sections afterwards to be located, "their location depending upon the establishment of the "line of the road. Until this is definitely fixed the grant "does not attach to any specific tracts of land. Upon the "line of the road being definitely located the grant then "first requires precision, and the company becomes in- "vested with an inchoate title to the particular land cov- "ered thereby, which can ripen into a perfect title only "as the construction of each section of 20 miles of road "is completed and approved, when the right to patents "for lands opposite to and coterminous with such con-

"structed section accrues.

"The proviso in the grant that the company shall "complete the whole of its road within five years from "the date of the act is a condition subsequent, the failure "to perform which does not ipso facto work a forfeiture "of the grant, but only gives rise to a right in the govern- "ment to enforce a forfeiture thereof. Yet in order to "enforce a forfeiture such right must be asserted by a "judicial proceeding, authorized by law, or by some legis- "lative action amounting to a resumption of the grant. "(Schulenberg vs. Harriman, 21 Wall., 44) Hence, "until advantage is taken of the non-performance of the "condition, under legislative authority, the interest of the "grantee in the grant remains unimpaired thereby.

"Such being the nature and effect of the grant and "its accompanying condition, and no action having been "taken by legislation or judicial proceedings to enforce a "forfeiture thereof, it follows that at the period of said "transfer by the New Orleans, Baton Rogue and Vicks- "burg Railroad Co. this company was invested with a "present interest in the number of alternate sections of "public lands per mile granted by the act of 1871, not- "withstanding it was already in default in the perform- "ance of the condition referred to, and that it still re- "tained a right to proceed with the construction of the "road in aid of which the grant was made until advantage "should be taken of the default. But as it had not then "definitely fixed the line of its road, although a map des- "ignating the general route thereof was duly filed, that "interest did not attach to any specific tracts of land,

"but remained afloat, as it were, needing a definite loca-
"tion of the road before it could become thus attached.
"Was the interest here described assignable to another
"company, so as to entitle the latter to the benefit of the
"grant in aid of the construction of its road between the
"places named therein, without the assent of Congress?

"Doubt has perhaps arisen on this point in view of
"the fact that in one or two instances it has been thought
"expedient to obtain legislation by Congress confirming
"or authorizing a similar assignment (see section 2 of
"the act of March 3, 1865, chapter 88, and section 1 of
"the act of March 3, 1869, chapter 127), and also in view
"of the adverse ruling of this department in the case of
"the Oregon Central Railroad Company. (13 Opin.,
"382) However, a similar assignment made in 1866 by
"the Hannibal and Saint Joseph Railroad Company to
"the Pike's Peake Railroad Company, afterward known
"as the Central Branch Company, was held to be valid
"by Attorney-General Stanbury in an opinion given to
"the Secretary of the Treasury under date of July 25,
"1866.

"In the latter case the Hannibal and Saint Joseph
"Company, which was incorporated by the State of Mis-
"souri, with authority to construct a railroad between
"Hannibal and Saint Joseph, within that State, was, by
"the Pacific Railroad act of July 1, 1862 (section 13),
"authorized to 'extend its road from Saint Joseph, via
"Atchison, to connect and unite with the road through
"Kansas, and may for this purpose use any railroad
"charter which has been or may be granted by the legis-

"lature of Kansas', & c., and by the fifteenth section of "the same act it was provided that 'wherever the word "company is used in this act it shall be construed to em- "brace the words their associates, successors and assigns "the same as if the words had been properly added there- "to.' Subsequently, in 1863, an assignment was made "by that company of all its rights under said act (which "included an interest in both a land and a bond subsidy) "to the Atchison and Pike's Peake Railroad Company, "a company previously organized under a charter grant- "ed by the legislature of Kansas. The latter company "having constructed a section of 20 miles of the proposed "road west from Atchison claimed the benefit of the "grant made to the Hannibal and Saint Joseph Com- "pany, as its assignee, and this claim was recognized and "allowed, in accordance with the opinion of the Attorney- "General. It will be observed, however, that the Hanni- "bal and Saint Joseph Company was authorized to 'use "any railroad charter which has been or may be granted "by the legislature of Kansas,' and this, together with "the provision in the fifteenth section quoted above, may "have been regarded as sufficient to sustain the assign- "ment.

"In the case of the Oregon Central Railroad Com- "pany, mentioned above, a grant of a right of way "through the public lands, and also of alternate sections "thereof, was made to that company, 'and to their suc- "cessors and assigns,' by the act of May 4, 1870, chapter "69, for the purpose of aiding in the construction of a "railroad and telegraph line between certain places in

"Oregon. In August following an instrument was exe-
"cuted by the company assigning all its interest in the
"grant to the Willamette Valley Railroad Company,
"and thereupon the question arose whether the grant was
"susceptible of being thus transferred. The Attorney-
"General (Mr. Akerman), to whom the question was
"submited, after reviewing the various provisions of the
"act, some of which (see section 5) imposed certain duties
"and required certain important acts to be performed
"by the company, decided in the negative, holding that,
"upon consideration of those provisions, the Oregon Cen-
"tral Company was alone within the contemplation of
"Congress in respect to the donation made and duties
"imposed by that act. The words 'their successors and
"assigns' as used in the act, were regarded as words of
"limitation merely.

"But the grounds upon which that decision appears
"to have been based are not found to exist in the case
"now under consideration. Here a grant of a certain
"number of alternate sections of public lands per mile is
"made to the New Orleans, Baton Rouge and Vicks-
"burg Railroad Company, its successors and assigns, in
"and of the construction of a road from New Orleans, by
"the route indicated, to connect with the eastern ter-
"minus of the Texas and Pacific Railroad, which lands
"are required to be "withdrawn from the market, se-
"lected, and patents issued therefor, and opened for set-
"tlement and pre-emption upon the same terms and in
"the same manner and time as is provided for and re-
"quired from said Texas Pacific Railroad Company."

"The grant is coupled with no special duties or trusts, "for the performance of which there is reason to believe "the particular company named therein was more ac- "ceptable to Congress than any other. Its purpose is "to secure the construction of a railroad between the "points designated, and whether this purpose be ful- "filled by that company or by another company must "be deemed unimportant in the absence of any provision "indicative of the contrary. The interest derived by the "grantee, though it remains only afloat, is a vested in- "terest, and it is held under the same limitations which "apply after it develops into an estate in particular lands "until extinguished by forfeiture for non-performance "of the condition annexed to the grant. I perceive no "legal obstacle arising out of the grant itself to a transfer "of such interest by the grantee to another company, "and should the latter construct the road contemplated "agreeably to the requirements of the grant, and thus "accomplish the end which Congress had in view, I sub- "mit that it would clearly be entitled to the benefits "thereof.

"The question of the assignability of the interest of "the grantee would be more difficult if, after definitely "locating the line of its road, and thus attaching the "grant to particular lands along the same it was pro- "posed to transfer that interest to another company "for the benefit of a road to be constructed by the latter "on a different line, though following the general course "of the other road. But in the present case the facts "give rise to no such difficulty. The grant had not

"previous to the transfer become thus identified with a "particular line of road, and was thereafter susceptible "of location upon the line of the road projected by the "assignee (the New Orleans Pacific Company), pro- "vided this road met the requirements of the grant in "other respects, as to which no doubt is suggested.

"My conclusion is that the assent of Congress to the "assignment made by the New Orleans, Baton Rouge "and Vicksburg Railroad Company, as above, is not "necessary in order to entitle the assignee to the benefit "of the land grant in question.

"The remaining questions relate to the 68 miles of "railroad formerly belonging to the New Orleans, Mo- "bile and Texas Rialroad Company, but now owned by "the New Orleans Pacific Company, and made a part "of its main line between New Orleans and Baton Rouge.

"The land grant in question was, as its language im- "ports, made in aid of the construction of a railroad be- "tween certain termini, contemplating a road to be con- "structed, not one already constructed. It has not been "the policy of Congress thus to aid constructed roads. "Had a constructed road existed at the date of the grant, "which extended from one terminus to the other, and "afterward the New Orleans, Baton Rouge and Vicks- "burg Railroad Company, instead of entering upon and "completing the construction of a road, had purchased "the road already constructed, this, it seems to me, would "not have satisfied the purpose of the grant so as to "entitle the company to the benefit thereof. The same

"objection would apply where the constructed road ex-
"tended over only a part of the route contemplated by
"the grant. So far as I am advised, the action of the
"government hitherto has accorded with this view. On
"the other hand, if such road was constructed subse-
"quently to the date of the grant, and is owned by the
"grantee or the assignee of the latter, I see no ground
"for excluding it from the benefit of the grant should it
"otherwise fulfill the requirements thereof.

"Agreeably to the foregoing views, and in direct
"response to the several questions submitted, I have the
"honor to reply as follows: The first, second, and third
"questions I answer in the affirmative. The fourth
"question (including the alternative added thereto) I
"answer in the negative. The fifth question I answer
"in the affirmative—assuming, as I do, the company
"named therein to be an assignee of the grantee in the
"act referred to.

"I have the honor to be, very respectfully,

"BENJAMIN HARRIS BREWSTER,

"Attorney General.

"Hon. H. M. Teller,

"Secretary of the Interior."

Whereupon witness was shown and recognized Report No. 906, 47th Congress, Second Session, Senate, of date January 2, 1883 from the Committee on the Judiciary to accompany Bill S. 2301, by Mr. Garland, and identified as Defendants Exhibit No. 377. Whereupon defendants offered and the same was received in evi-

dence, and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness was shown and recognized Defendants Exhibit No. 378, being certified copies of certain correspondence between Joseph S. Wilson, as president of the European & Oregon Land Company, with replies thereto by the Commissioner of the General Land Office, offered collectively as one exhibit, which correspondence is in part under the signature of Joseph S. Wilson, President, on the letterheads of the European & Oregon Land Company. Whereupon defendants offered and the said Defendants Exhibit 378 was received in evidence, and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness was shown and recognized Defendants Exhibit 379, being a certified copy of map of the Oregon Central Railroad Company, West Side, filed by it under the Act of May 4, 1870, showing the definite location of the line of the Oregon Central Railroad under the Act of May 4, 1870, which was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon it was stipulated between the parties that the Court in any stage of this case until and including a final hearing in the Supreme Court of the United States, if the case

shall reach that court, shall take judicial notice of all proceedings had in and final disposition of the forty-five suits against purchasers referred to in the "Stipulation as to the Facts," including issuance of patents to the lands therein described when issued, if any shall be issued, which stipulation, it was agreed, was subject to the objection on the part of complainant that the evidence is immaterial and irrelevant.

Whereupon, on cross examination, witness identified Government's Exhibits 126A, 126B, 126C, 126D, 126E, 126F, 126G, 126H, and 126I as correct copies of the originals of which they purported to be, and it was stipulated that these documents were properly executed and acknowledged, or signed by the parties purporting to have signed the same; proof of the execution and further identification of such documents being waived.

Whereupon complainant offered and there was received in evidence said Exhibits 126A, 126B, 126C, 126D, 126E, 126F, 126G, 126H and 126I, and the same are herinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon, witness further testified that there is printed in the same type as that of all other documents introduced in said Government's Exhibit 126A, 126B, 126C, 126D, 126E, 126F, 126G, 126H and 126I, Acts of Congress relating to the Oregon and California and Oregon Central Railroad Companies, chapter 242, "An Act granting lands to aid in the construction of a rail-

road and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," (14 U. S. Statutes, page 239), at the foot of which printed statute appears the words "Approved July 25, 1866; also chapter 80, "An Act to amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,'" (15 U. S. Statutes, page 80), at the bottom of that "Approved June 25, 1868"; and also "An Act to amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon, approved July 25, 1866"; and at the bottom of that "Approved April 10, 1869 (16 U. S. Statutes, page 47); also "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," at the bottom of that "Approved May 4, 1870 (16 Statutues, page 94), these statutes, respectively, being set out in this printed document at length and in full.

Whereupon it was stipulated that the Central Pacific Railroad Company completed the construction and equipment of the California and Oregon Railroad from Chico to the south boundary line of Oregon in several sections, all on or before June 20, 1888; that the said entire constructed railroad was examined by commissioners appointed for the purpose and favorably reported on by them; that such report was submitted by the Secretary of the Interior with his favorable recommenda-

tions to the President, and such recommendations approved by the President, all on or before November 8, 1889.

Whereupon it was stipulated by and between the parties that the Court may take judicial notice of the decisions of the Secretary of the Interior and the Commissioner of the General Land Office, and the rules and regulations of the Land Department, of the reports of either of these officers to Congress, and the reports of any committee of Congress and the action of Congress thereon; subject to the objection that may be made by either party to the same, or any thereof, as incompetent, immaterial or irrelevant, or any other objection which might legally be interposed, it being intended to waive the actual production of these documents, to save expense and the incumbering of the record.

It was further stipulated by and between the parties that the following documents were recorded, in the manner provided by law, in the Records of Deeds and Mortgages of Multnomah County, Oregon, at the dates hereinafter mentioned, and thereafter, and about the same time, in the Records of Deeds and Mortgages of the other counties of Oregon in which any part of the lands involved in this suit are situated, to-wit:

Oregon and California Railroad Company to Faxon D. Atherton and Milton S. Latham, of date April 15, 1870, recorded April 16, 1870, at page 745, Book C, of the Records of Mortgages of Multnomah County, Oregon;

The Oregon Central Railroad Company to Milton S. Latham and Faxon L. Atherton, Trustees, of date July 15, 1871, recorded at page 132, Book E, of the Records of Mortgages of Multnomah County, Oregon, October 14, 1871;

The Oregon and California Railroad Company to Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, of date April 15, 1870, recorded at page 727, Book K, of the Records of Deeds of Multnomah County, Oregon, April 18, 1870;

Oregon and California Railroad Company, Richard Koehler, Heinrich Hohenemser and others, to Klaas Van Oterendorp and Philip N. Lilienthal, Trustees, of date January 1, 1881, recorded February 28, 1881, at page 346, Book X, of the Records of Mortgages of Multnomah County, Oregon:

Oregon and California Railroad Company to Henry Villard, Horace White and Charles Edward Bretherton, Trustees, of date June 1, 1881, recorded August 18, 1881, at page 1, Book 27, of the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company to Henry Villard, Robert Davie Peebles and Charles Edward Bretherton, Trustees, of date June 2, 1881, Recorded September 13, 1881, at page 179, Book 27, of the Records of Mortgages of Multnomah County, Oregon.

Oregon and California Railroad Company and Robert Davie Peebles, George H. Hopkinson and Patrick Buchan, to Farmers Loan and Trust Company, of date

May 26, 1883, recorded at page 33, Book 41, on that date, in the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company to Union Trust Company of New York, of date July 1, 1887, recorded January 20, 1888, page 287, Book 63, of the Records of Mortgages of Multnomah County, Oregon.

Deed executed by Oregon Central Railroad Company to Oregon and California Railroad Company, of date March 29, 1870, recorded April 14, 1870, Page 702, Boox K, of the Records of Deeds of Multnomah County, Oregon;

Deed of Oregon and California Railroad Company, Milton S. Latham, Faxon D. Atherton and William Norris, to European and Oregon Land Company, of date March 28, 1871, recorded page 223, Book N, of Records of Deeds of Multnomah County, Oregon, April 4, 1871;

Deed from the European and Oregon Land Company to Milton S. Latham, Faxon D. Atherton, and William Norris, Trustees, and others, of date July 25, 1874, recorded page 264, Book Z, of the Records of Deeds of Multnomah County, Oregon, on January 4, 1875;

Deed from Oregon Central Railroad Company to Oregon and California Railroad Company, of date October 6, 1880, recorded at page 555, Book 42, Records of Deeds of Multnomah County, Oregon, on October 6, 1880.

It is further stipulated and agreed that either party may at any time furnish a certified copy of either of said documents herein above set out, and the same shall be admitted in evidence subject to any objection that the same is incompetent, irrelevant or immaterial; and this stipulation is made subject to any objection that either party may desire to make to the same, or any part thereof, as incompetent, irrelevant or immaterial.

It is further stipulated that, with respect to all of the conveyances, deeds of trust, mortgages and other documents above described, such proceedings were had that at the time of the filing of the bill of complaint, and at all times subsequent thereto, no parties had any right, title, or interest in or to, or lien upon, any of the lands involved in this suit, other than the defendants herein; the sole purpose of this portion of the stipulation being to avoid any question of defect of parties defendant.

It is further stipulated that the court may take judicial notice of the pleadings, proof and final decrees in the cases of United States v. Oregon and California Railroad Company, John A. Hurlburt and Thomas L. Evans; and United States v. The Oregon and California Railroad Company and Oregon Central Railroad Company—the latter named case commonly known as the "Quadrant Case;" and both of which cases reached the Supreme Court of the United States; and that either party, without being compelled to produce the records, may refer to any part of said record, including all plead-

ings, stipulations of fact, and other proceedings in each of said suits, subject to any objection that the same may be incompetent, irrelevant or immaterial, all parties reserving the right to introduce at any time to complete the record a certified copy of such pleadings, papers, stipulations, decrees or other proceedings in either of said cases, or any thereof, subject as aforesaid to any objection of either party that the same may be incompetent, irrelevant or immaterial.

It is further agreed between the parties hereto that the stipulations of fact signed by the parties in said causes were prepared by the attorneys for the defendants therein, and submitted to the Attorney General, who signed them.

Whereupon defendants offered in evidence, marked collectively "Defendants' Exhibit 381," Circulars Nos. 208 and 218, issued by the Department of the Interior, described as follows:

"Circular No. 208. The Three-Year Homestead Law. Department of the Interior, Washington, February 13, 1913."

"Circular No. 218. Additional Entries under the Enlarged Homestead Acts—Instructions. Department of the Interior. General Land Office. Washington D. C., March 17, 1913. (To) Registers and Receivers, United States Land Office, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, Utah, Washington and Wyoming.

Whereupon the same were received in evidence and

marked as "Defendants' Exhibit 381" subject to the objection of the complainant that the same are incompetent, immaterial and irrelevant, and the said exhibit is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants offered in evidence a summary of patents to the Oregon and California Railroad Company, marked "Defendants' Exhibit 382," the Government waiving the calling of a witness to verify the accuracy of the statement, which said Defendants' Exhibit 382 was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants offered in evidence a certified copy of the original reports of the commissioners appointed to examine and report upon the various sections of the constructed railroad of the Oregon Central Railroad Company (West Side), and of the Oregon Central Railroad Company (East Side), together with the action of the Secretary of the Interior and the President of the United States thereon, marked collectively "Defendants' Exhibit 383," which was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants offered in evidence a certified copy of the affidavit of Henry Villard, of date January 8, 1883, from the records of the office of the Secretary of the Interior, marked Defendants' "Exhibit 384,"

to which complainant objected upon the ground that the same is incompetent, irrelevant and immaterial, and was an affidavit unauthorized by law, and is a self-serving declaration made by the President of the Oregon and California Railroad Company, and not a proceeding in which the Secretary of the Interior had any jurisdiction or discretion to act, and therefore such affidavit imports no notice of any kind to the United States,, and did not in any way pertain to any official duty of any officer of the United States.

Whereupon said affidavit was received in evidence, marked "Defendants' Exhibit 384," and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants offered in evidence, for convenience of parties, and in furtheranc of the stipulation, Report of the Committee on Public Lands, No. 1664, of date May 29, 1884, 48th Congress, First Session; Report No. 931 from the Committee on Public Lands, March 8, 1886; and Report No. 390 from the Committee on Public Lands, March 8, 1886—the last two reports being to the 49th Congress, First Session, and the same were marked collectively "Defendants' Exhibit 385", and were received in evidence, subject to the objections herein heretofore reserved, which said "Defendants' Exhibit 385" is hereinafter set out and described and made a part of this statement of the evidence, and identified herein as such.

Whereupon, for convenience, defendants offered and

there was received in evidence in connection with the stipulation as to the Quadrant Case, reference to United States vs. Oregon & California R. R. Co., 57 Federal 426; Oregon and California R. R. Co. vs. United States, 67 Federal 650; United States vs. Oregon &c. Railroad, 164 U. S. 526; and for convenient reference in the case known as "Northern Pacific Overlap"; U. S. vs. Oregon & C. R. R. Co., 69 Federal 899; Oregon & C. R. R. Co. vs. United States 77 Federal 67; United States v. Oregon & California Railroad Company 176 U. S. 28.

Whereupon defendants offered in evidence, marked collectively "Defendants' Exhibit 386", certified copies of the following deeds:

A deed from the Oregon and California Railroad Company to the City of Portland, of date July 3, 1893, for the S. ½ of S. ½ and NE ¼ of SE ¼, Section 23, Township 1 S., Range 5 E.; all of Section 27, Township 1 S., R. 5 E.; N. ½ of N. W. ¼, SE ¼ of NW ¼, W. ½ of NE ¼, SE ¼ of NE ¼, NE ¼ of SW ¼, and SE ¼, Section 31, Township 1 S., R. 5 E.; E ½ Section 33, Township 1 S., R. 5 E.; N ½ Section 19, Township 1 S., R. 6 E.; N ½ Section 5, Township 2 S, R. 5 E., containing 2234.70 acres, of which 514.80 acres are in Bull Run Forest Reserve, for the consideration of $4579.40.

Also a deed of date July 3, 1893, for S ½ of NE ¼ and S½, Section 25, Township 1 S., Range 5 E.; N ½ of NE ¼ and NW ¼, Section 35, Township 1 S., Range 5 E., S ½, Section 19, Township 1 S., Range 6 E., con-

taining 955.52 acres, all of which is in the Bull Run Forest Reserve for the consideration of $1958.82, which said Defendants' Exhibit 386 was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

In connection with Defendants' Exhibit 386, defendants refer to the Act of September 29, 1890, known as the General Forfeiture Act, 28 Stat. L. 496-498.

Whereupon defendants offered in evidence certified copies of stipulations as to facts in the following cases:

No. 2272. United States v. Oregon & California Railroad Company; No. 2661. United States v. Oregon & California Railroad Company; No. 2658. United States v. Oregon & California Railroad Company; No. 2273, United States v. Oregon & California Railroad Company; No. 2657. United States v. Oregon & California Railroad Company; No. 1936. United States v. Oregon & California Railroad Company and Oregon Central Railroad Company; and the same were severally and separately marked, in the order named, "Defendants' Exhibits 387, 388, 389, 390, and 391, and 392, to each of which complainant objected on the ground that these are manifestly introduced for the purpose of binding the Government by the matters of fact set forth in such stipulations, and that such stipulations show upon their face that they were designed for use in the particular cases in which they were made, and not for use in any other litigation, and upon the further ground that the

issues in those cases in no way involved the question of the exact date or manner of the vesting of the grant under the Act of July 25, 1866, and further, upon the general grounds that they are incompetent, irrelevant and immaterial. Which said Defendants' Exhibits 387, 388, 389, 390, 391 and 392 were received in evidence and are hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants produced and formally offered in evidence certified copies of the deeds and mortgages hereinbefore referred to in the stipulation of parties, and the same were severally and separately marked as Defendants' Exhibit 393, 394, 395, 396, 397, 398, 399, 400 and 401, described as follows:

Mortgages. Oregon and California Railroad Company to Faxon D. Atherton and Milton S. Latham, of date April 15, 1870, recorded April 16, 1870, page 745, Book C. (Marked "Defendants' Ex. 393").

Oregon Central Railroad Company to Milton S. Latham and Faxon D. Atherton, Trustees, of date July 15, 1871, recorded page 132, Book E. (Marked "Defendants' Ex. 394").

Oregon and California Railroad Company et al. to Van Oterendorp et al., of date January 1, 1881, recorded page 346, Book X. (Marked "Defendants' Ex 395").

Oregon & California Railroad Company to Villard,

White and Bretherton, of date June 1, 1881, recorded page 1, Book 27. (Marked "Defendants' Ex. 396").

Oregon & California Railroad Company to Villard, Peebles and Bretherton, of date June 2, 1881, recorded page 179, Book 27. (Marked "Defendants' Ex. 397").

Oregon & California Railroad Company et al. to Farmers Loan & Trust Company, of date May 26, 1883, recorded page 33, Book 41. (Marked "Defendants' Ex. 398").

Deed of Trust. Oregon and California Railroad Company to Latham, Atherton and Norris, Trustees, of date April 15, 1870. (Marked "Defendants' Ex. 399").

Deeds. Oregon & California Railroad Company to European and Oregon Land Company, dated March 28, 1871, recorded Book N, page 223. (Marked "Defendants' Ex. 400").

European & Oregon Land Co. to Latham, Atherton and Norris, of date July 25, 1874. Recorded page 264, Book Z. (Marked "Defendants' Ex. 401").

Whereupon defendants produce certified copy of Quitclaim deed No. 1719, Oregon and California Railroad Company to the City of Portland, issued for Contract 3827. Dated March 14, 1892. Recorded Book 179, p. 203. Deed No. 995. And offer the same in connection with Deeds No. 2045 (issued for contract 1705), of date July 3, 1893, recorded Book 245, page 438, Oregon & California Railroad Company to the City of Portland; and deed No. 2046 (issued for Contract 1804),

of date July 3, 1893, recorded Book 246, page 468; heretofore offered and received as "Defendants' Exhibit 386."

Received and marked "Defendants' Exhibit 402," which said exhibits, so marked, are hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon defendants offered in evidence Exhibit 402, described as follows:

Certified copy of Quitclaim deed No. 1719, Oregon and California Railroad Company to the City of Portland, issued for Contract 3827. Dated March 14, 1892. Recorded Book 179, p. 203. Deed No. 995. And offered the same in connection with Deeds No. 2045 (issued for Contract 1705), of date July 3, 1893, recorded Book 245, page 438, Oregon & California Railroad Company to the City of Portland; and deed No. 2046 (issued for Contract 1804), of date July 3, 1893, recorded Book 246, page 468; heretofore offered and received as "Defendants' Exhibit 386," and the same was received in evidence over the objection of complainant that the same was incompetent, irrelevant and immaterial, and is hereinafter set out and described and made a part of this statement of the evidence, and identified as "Defendants' Exhibit 402."

"Whereupon it was stipulated between counsel for the respective parties that Deed No. 2046, of date July 3, 1893, consideration $1958.82, was executed pursuant to Contract No. 1804, of date February 16, 1883, exe-

cuted to A. G. Cunningham; and that the deed of date March 14, 1892, executed by Oregon and California Railroad Company to the City of Portland for the Northwest quarter of the Southwest quarter and the Southwest quarter of the Southeast quarter, of Section 23, Township 1 South, Range 4 East, W. M., and the North half of the Southwest quarter of Section 5, Township 2 South, Range 5 East, W. M., containing 160 acres, was executed pursuant to contract No. 3827, but date of contract is not given in deed and date is unknown to counsel at this time.

It was further stipulated that at a meeting of the Water Board of the City of Portland of April 7, 1891, a committee was appointed to investigate these contracts and find out the amounts due, and the chairman, Henry Failing, reported that the amount necessary to pay off contracts was $8532.84; whereupon warrants were drawn for this amount, but deeds were not delivered until two years later, on account of final payments required according to the following memorandum, which appears on an envelope in the handwriting of Superintendent Dodge of the Water Board of the City of Portland:

Amounts paid O. & C. R. R. Co. by City of Portland:

April 17, 1891.....	$5958.69	
	2574.15	$8532.84
May 18, 1893.....	$ 522.05	
	490.00	
	102.80	1114.85
	222.30	
	208.65	
	33.00	463.95
		10,111.64

"X." "Form of First Mortgage Construction Bonds of the Oregon Central Railroad Company.

No..... $.....

UNITED STATES OF AMERICA

STATE OF OREGON.

OREGON CENTRAL RAILROAD COMPANY.

Incorporated November 21, 1866.

FIRST MORTGAGE CONSTRUCTION BONDS.

KNOW ALL MEN BY THESE PRESENTS: That the Oregon Central Railroad Company, a body corporate, created under and pursuant to the laws of the State of Oregon, hereby acknowledges itself indebted and bound to the holder hereof, in the sum of one thousand dollars, gold coin of the United States of America, which sum the Oregon Central Railroad Company hereby promises to pay, at banking-house of Messrs. Dabney, Morgan & Company, in the City of New York, State of New York, to the said holder, on the fifteenth day of July, A. D. one thousand eight hundred and ninety-one, with interest from and after July fifteenth, A. D. one thousand eight hundred and seventy-one, at the rate of seven per centum per annum, payable semi-annually at the said banking-house of Messrs. Dabney, Morgan & Company, in the said City of New York, on the fifteenth day of January and July of each year after July fifteenth, one thousand eight hundred and seventy-one, on presentation and surrender of the annexed dividend and interest warrants.

This bond is one of a series of twenty-nine hundred thirty bonds of one thousand dollars each, numbered from one to twenty-nine hundred and thirty, both inclusive, and of twenty-nine hundred and thirty bonds of five hundred dollars each numbered from twenty-nine hundred and thirty-one to five thousand eight hundred and sixty, both inclusive, and amounting in the aggregate to four millions three hundred and ninety-five thousand dollars, and which have been made and executed by said Oregon Central Railroad Company under express authority granted by Acts of the Legislature of the State of Oregon, and also by an Act of Congress of the United States of America, approved May fourth, in the year of our Lord, one thousand eight hundred and seventy, and entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' and for the purposes authorized by and specified in said Acts, and each of them, and as security for the payment to the holders of said issue of five thousand eight hundred and sixty bonds, with interest to grow due thereon, said Oregon Central Railroad Company has duly executed, acknowledged and delivered, under the authority of said several Acts and of resolutions unanimously passed and adopted by its board of directors, to Milton S. Latham and Faxon D. Atherton, as Trustees, a mortgage or deed of trust bearing even date herewith, and whereby all the real and personal property, rolling-stock, roads, depots, stations, side-tracks, wood-yards, franchises and effects, now owned or acquired,

or hereafter to be owned or acquired by it, are mortgaged and conveyed to the said trustees and the survivors of them, as by reference to said mortgage or deed of trust, or the record thereof, will more fully appear, and to which and to all the terms and provisions thereof, reference is hereby specially made.

And as a further security for the payment to the holders of said issue of said five thousand eight hundred and sixty bonds, with interest to grow due thereon, the said Oregon Central Railroad Company, has, in the manner and upon the terms and conditions specified in the said mortgage or deed of trust, irrevocably appropriated and set apart all the net proceeds of the sales of the lands granted to aid in the construction of the railroad and telegraph line of the said Oregon Central Railroad Company from Portland to Astoria and McMinnville, in the State of Oregon, described and mentioned in the Act of Congress of the United States of America, approved May fourth, one thousand eight hundred and seventy, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' for the creation and maintenance of a sinking fund to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity of all said bonds, both principal and interest, in the mode and manner specified in said mortgage or deed of trust, and to which reference is hereby made as a part hereof.

In witness whereof, the said Oregon Central Railroad Company has caused this bond to be signed by its president and attested by its secretary, and its corporate seal to be hereunto affixed, at its office in the City of Portland, county of Multnomah, and State of Oregon, under the express authority of resolutions of its board of directors, this fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-one.

.....President.

.....Secretary.

This is to certify that the above bond is one of five thousand eight hundred and sixty bonds which are embraced in the mortgage or deed of trust, bearing even date herewith, made and executed by the Oregon Central Railroad Company, whereby all its real and personal property, rolling-stock, equipment, depots, roads, stations, side-tracks, wood-yards, franchises and effects, acquired and to be acquired, and also all the lands granted to said Oregon Central Railroad Company by the act of Congress of the United States of America, approved May fourth, one thousand eight hundred and seventy, and entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' are mortgaged and conveyed to us as trustees, as security for the payment of all said bonds, and which mortgage or deed of trust has been recorded in the several counties of Oregon, through which the railroad of said company runs, and constitutes the first lien or incumbrance upon the property therein described.

....., Trustees.

(Form of Coupon.)

$..... The Oregon Central Railroad Company will pay to the holder hereof..... in United States gold coin, at the banking house of Dabney, Morgan & Company, in the City of New York..... on the fifteenth day of.....18.....being semi-annual interest on bond No.....

....., Secretary."

Whereupon the defendants offer in evidence from said printed document page 11 thereof, No. VII., likewise identified by the witness William Singer as a part of the collection of Laws and Documents referred to, and which is in words and figures as follows, to-wit:

"First Mortgage Bond of the Oregon and California Railroad Company.

UNITED STATES OF AMERICA.

STATE OF OREGON.

No..... $1000.

OREGON AND CALIFORNIA RAILROAD COMPANY.

Principal and interest payable in U. S. gold coin. Free from any U. S. government tax.

FIRST MORTGAGE BOND.

The Oregon and California Railroad Company acknowledges itself indebted for value received to the holder hereof in the sum of one thousand dollars, gold coin of the United States of America, which it promises

to pay to the holder hereof in the City of New York, on the first day of April, one thousand eight hundred and ninety, with interest thereon at the rate of seven per centum per annum, payable in gold coin as aforesaid, free from any U. S. government tax, semi-annually on the first days of April and October of each year, at the banking-house of Messrs. Dabney, Morgan & Co., in the city of New York, on presentation and delivery of the annexed interest warrants as they severally become due. And the said company agrees that this obligation and all rights and benefits arising therefrom may be transferred by general or special indorsement or by delivery as if the same were a note of hand payable to bearer.

This bond is one of a series issued by said company amounting in the aggregate to the sum of ten millions nine hundred and fifty thousand dollars, the said issue of bonds being expressly limited to the sum of thirty thousand dollars per mile for the entire length of the railroad of the said company to provide for the construction and equipment of the said railroad, and the said bonds are secured by a first mortgage on the said railroad, its franchise and rolling stock properly executed by the said company to Milton S. Latham and Faxon D. Atherton, trustees, for the holders thereof, by which mortgage the said company has conveyed to the said Milton S. Latham and Faxon D. Atherton in trust for the use and benefit of the holders of said bonds the said railroad, its franchises and rolling stock, as by reference to the said mortgage or the record thereof, as by reference

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being thereunto had will more fully appear. And the said bonds have been further secured by a conveyance to the said Milton S. Latham and Faxon D. Atherton as trustees of the entire land grant made by the United States to said company of 12800 acres of land for each mile of its said railroad, said lands having been set apart and their proceeds having been pledged as a sinking fund, for the redemption of said bonds, as by reference to said last-mentioned conveyance in trust, or the record thereof, reference being thereunto had, will also more fully appear.

In witness whereof, the Oregon and California Railroad Company has caused its corporate seal to be affixed to this bond, and the same to be signed by its president and secretary, at the office of the said company in the State of Oregon, this fifteenth day of April, one thousand eight hundred and seventy.

....., President.
....., Secretary.

Coupon No. 40. $35. The Oregon and California Railroad Company will pay to the holder hereof thirty-five dollars, in U. S. gold coin, at the banking-house of Messrs. Dabney, Morgan & Co., at the city of New York, on the first day of April, 1890, being semi-annual interest on bond.

A. E. CUNNINGHAM, Secretary.

(Indorsed:) No..... $1000. United States of America. State of Oregon. Oregon and California Railroad Company. First mortgage, land grant, seven

per cent. gold bond. Interest payable in gold on the first days of April and October of each year, at the banking-house of Messrs. Dabney, Morgan & Co., in the city of New York, free from any U. S. government tax.

We hereby certify, that this bond is one of the within described series, amounting in the aggregate to $10,950,000, and is secured by a mortgage upon the property and franchises of the company, and is further secured by a conveyance to us, in trust of its land grant of 12800 acres of land for each mile of road constructed as within described, the said mortgage being dated the fifteenth day of April, 1870, and executed and delivered to us, which said mortgage is recorded in the several counties of the State of Oregon, through which said railroad passes.

....., Trustees."

Mr. Townsend: Both of the last two preceding forms are subject to the objection on the part of the Government that the same are incompetent, irrelevant and immaterial.

Whereupon A. K. SLOCUM was called as a witness on behalf of defendants, and being duly sworn, testified that he was manager of Circulation of the Oregonian on February 15, 1908, and recognized the photograph attached to his affidavit as a correct reproduction of a portion of the Morning Oregonian of the issue of August 12, 1871, which is undoubtedly a copy from the Oregonian of that date, and his affidavit to the effect that it is a photographic copy of the paper of that issue is correct, because he checked it up at that time. That

advertisement appeared in the Oregonian of the issues from August 12, 1871 to September 11, 1872, upon the dates listed in his affidavit, and the dates given are correct as shown by the original files of the Oregonian, which he inspected. Which evidence was received subject to the objection heretofore made to said Defendants' Exhibit 280 heretofore received in evidence.

Whereupon J. B. EDDY, called as a witness on behalf of the defendants, and being duly sworn, testified; that he is tax and right of way agent of the Southern Pacific Company, and tax agent of the Oregon and California Railroad Company, and has been in the tax department of the Oregon and California Railroad Company eight years. He was State Railroad Commissioner from 1893 to 1898. He entered the services of the Oregon and California Railroad Company in the tax department when it was consolidated with the O. R. & N. Company. He means when the offices were consolidated, the companies were not consolidated, they were put under the same general management at this end. He was right of way agent for the Southern Pacific Company, Pacific Railway and Navigation Company, Corvallis and Eastern Railway Company—the allied lines of the Southern Pacific Company in Oregon; and was also right of way agent for the Oregon and California Railroad Company —that is all property purchased for the use of the Southern Pacific Company for operating is purchased in the name of the Oregon and California Railroad Company, in connection with its leased lines. The Southern Pacific Company does not own any lands. The Oregon and

California owns it all, and when the Oregon and California Railroad Company finds it necessary to have additional right of way for any additional mileage that may be operated by the Southern Pacific Company, that right of way is acquired in the name of the Oregon and California Railroad Company and added to the holdings of that Company as railroad property. He has procured certain copies of so much of the assessment rolls of the Counties of Washington, Yamhill, Clackamas, Polk, Marion, Lincoln, Benton, Linn, Lane, Douglas, Coos, Curry, Josephine, Jackson, Klamath, Columbia, Tillamook, and Multnomah, in which the unsold lands of the Oregon and California Railroad Company involved in this suit are situated, including the unpatented lands to which the Company has obtained title within the primary or selected limits for the year 1911. Whereupon witness being shown Defendants' Exhibit 318, purporting to be such certified copy of so much of said assessment rolls for those counties as relates to said lands, and the same being recognized as such by the witness, defendants offered and they were received in evidence over the objection of complainant, that the same are incompetent, irrelevant and immaterial, being Defendants' Exhibit 318, which is hereinafter set out and described and made a part of this statement of the evidence identified as such. Whereupon witness further testified that he had prepared or verified from his records, based upon the taxes actually paid by the Oregon and California Railroad Company on the unsold Congressional lands, the acreage for each county, the valuation as shown by the

records of his office and the assessment rolls, and the valuation upon which the company has paid these taxes, the average value per acre as computed, the average value in mills, the total tax paid, and the average tax per acre in all of these counties, from 1904 down to and including the year 1911, and had prepared a blue-print tabulated statement, which he is able to say is correct, based upon the tax records of the company and the vouchers for taxes paid. Whereupon witness recognized this tabulated or comparative statement, marked Defendants' Exhibit 319, and further testified that this was prepared in his office, under his direction, from the press-sheets, vouchers, tax receipts and records of the office pertaining to these unsold Congressional lands, and obtained the facts shown in his vouchers from the assessment rolls in the hands of the sheriff for the collection of taxes. These are taken from the counties. They always send some one there to check them up and then transfer them to their records. This table is based upon disbursements actually made to the sheriffs of the various counties in payment of taxes and represents the payments actually made by the company, and they are correct. Whereupon defendants offered in evidence Defendants' Exhibit 319, to which complainant objected as incompetent, irrelevant and immaterial, which was received in evidence, so marked, and is hereinafter set out and made a part of this statement of the evidence and identified as such. Whereupon witness being shown two documents, marked for identification Defendants' Exhibit 320, and treated as one exhibit, Statement No.

1-A, showing by counties the assessment upon Congressional lands of the Oregon and California Railroad Company from 1891 to 1904, inclusive, of date January 4, 1906, purporting to be prepared by the auditor in San Francisco on that date; and Statement No. 1, showing by counties the assessment upon Congressional lands of the Oregon and California Railroad Company from 1891 to 1904, inclusive, together with the acreage assessed, the assessed valuation, the average assessed valuation per acre, the total taxes paid, and the average taxes paid per acre, purporting to be prepared by the auditor at San Francisco, California, September 20, 1905, Statement No. 1-A also showing the acreage assessed, the assessed valuation, the average assessed valuation per acre, the total taxes paid, and the average tax paid per acre, and stated that these documents came from the auditor at San Francisco and are a part of the records of the office. The records of the company in San Francisco were destroyed by earthquake and fire on April 18th, 1906. The name of Robert Adams is the name of an employe in the auditor's office, signed at the lower left hand corner of Statement No. 1, and he is satisfied from the documents that they were prepared in the auditor's office from the records of the company, and he has acted upon that as such for the company, and has every reason to believe that they are correct. He did not make them, but they correspond with the records of later date. Whereupon defendants offered these documents as one exhibit, Defendants' Exhibit 320, to which complainant objected as incompetent, irrelevant and im-

material, which exhibit was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified as such. Whereupon witness further testified that one of these documents was arranged by counties and the other by years, merely for convenience. The same information is in one that is in the other, only put in a little different way for convenience of reference. He prepared Defendants' Exhibit 321 from the records in his office, and that table or statement includes the information contained in part in Defendants' Exhibit 319 and Defendants' Exhibit 320. There is an overlap in those though. Defendants' Exhibit 319 and Defendants' Exhibit 320 are all summarized in Defendants' Exhibit 321. Defendants' Exhibit 321 is a correct statement of what it purports to show. Whereupon defendants offered in evidence Defendants' Exhibit 321, to which complainant objected as incompetent, irrelevant and immaterial, which exhibit was received in evidence and is hereinafter set out and described and made a part of this statement of the evidence and identified as such. Whereupon witness further testified, that this Defendants' Exhibit 321 showed in Coos County the total tax per acre from 1891 to 1911, inclusive, as $2.54 per acre and that is correct; that the total tax in Columbia County is $2.75 per acre for the same period of time, and that is correct; that the total tax paid during that period of time, in Multnomah County, is $2.75 per acre and that is correct. These exhibits refer to the Congressional lands, granted lands, of the Oregon and California Railroad Company, and in

so far as they cover the unsold patented lands, they include all those that are involved in this suit. Witness further testified that he has been more or less familiar with the territory shown by the yellow field on Defendants' Exhibit 259, for twenty-nine years; tolerably familiar with it for twenty years, going up and down in it, traveling on the railroads, and on the wagon roads; and he became familiar with the topography and general physical characteristics of what is known as the Willamette Valley as an officer of this company and otherwise as an officer and citizen of the State. Whereupon complainant objected to any testimony as to the character of the lands involved in this suit upon the ground that the same is incompetent, irrevelant and immaterial. Whereupon it was stipulated between the parties that this same objection should be considered as taken to all testimony offered by defendants relative to this subject without the necessity of repeating the same. Whereupon witness testified that the territory known as the Willamette Valley is practically all in yellow within the 20-mile limit of the grant made to the Oregon and California Railroad Company of date of July 25, 1866, and is all that portion of the map north of Cottage Grove to Portland, a distance of about 125 miles, roughly speaking. On the east side of the Willamette River it is practically level from Eugene to Oregon City. On the west side it is level in Lane, Benton and Polk Counties; Yamhill, Washington and Columbia Counties are more rolling. It was taken up largely under the old Donation Land Act, in the early days of the settlement of the

state. He refers to the donation land law, but does not recall its date. He knows these things from the fact that, in checking the right of way deeds they bear reference to the donation claims. Oregon City is the County seat of Clackamas County; Salem the county seat of Marion County; Albany the county seat of Linn County; Eugene the county seat of Lane County; Corvallis the county seat of Benton county; Dallas the county seat of Polk County; and Hillsboro the county seat of Washington County; St. Helens the county seat of Columbia County. The State Capital is at Salem. The State Agricultural College at Corvallis. The State University at Eugene. Oregon City is the oldest town in the State of Oregon, according to history and his knowledge. In the beginning of the government in this country Oregon City was the State Capital. Dr. John McLoughlin took a donation claim at Oregon City. He was the Hudson Bay Factor, the virtual ruler of this whole territory at the time the settlement began, and is commonly called in the history of the country "the Father of Oregon." Portland was first established as a town about 1845 or 1846, and was named after Portland, Maine. Oregon City is the head of shipping on tide water with reference to the Willamette Valley. Portland is the chief port for shipment of the products of the Willamette Valley by sea. Astoria was founded by John Jacob Astor in the early part of the last century, as a fur trading point. The Columbia River is the northern boundary of the State of Oregon. Captain Gray discovered that stream in 1792. Salem has been

the capital of the State ever since it has been a state, but there was a territorial capital before that, at Oregon City and at Corvallis a little while. Oregon was admitted into the Union in 1859. The Territory of Oregon was first organized in 1849 and the Provisional Government in 1843. Polk County was named after James K. Polk, President of the United States. Dallas, the county seat of Polk County, was named after George M. Dallas, Vice-President of the United States. Benton County was named after Thomas H. Benton, Senator from Missouri. Linn County was named after Senator Linn, Senator from Missouri and a friend of the Oregon Territory. Lane County was named after General Joseph Lane, the first Territorial Governor of Oregon, and its first Senator in Congress after it became a State. The first settlement of any consequence in the Willamette Valley was in 1843. There was considerable immigration in 1842. Jason Lee came in 1836 and settled at Salem, or near Salem; Mission Bottom, he thinks, just below Salem. The bulk of that land covered with yellow, not taken by these wagon road grants is agricultural land. There are large areas of the Willamette Valley that are open plains; French Prairie, Howell Prairie, Tualatin Plains, and the Albany Prairie, and quite a number of others of lesser note. The sides of this field in yellow, begin to rise up gradually, are foothills—foothills of the Cascades on the east side, and foothills of the Coast Range on the west. In Polk County the foothills begin practically at the town of Dallas. East of Dallas it is level. West of Dallas it is foothills, rising up to tall

mountains and to timber. The large body of land in yellow in the vicinity of Roseburg and Oakland, in Douglas County, outside of the Roseburg and Coos Bay Military Wagon Road grant, were settled under the Donation Law in the fifties. The lands marked in yellow that were thus settled are small prairies and foothills. The large body of yellow along the creek from Ashland to the Rogue River was settled in the early fifties under the Donation Land Law and the Pre-emption and Homestead laws. That is the section known as the Rogue River Valley, and from the junction to Bear Creek with the Rogue River southerly to Ashland, and is a valley mostly prairie, open country. The Siskiyou Mountains are at the south end. The summit of the Siskiyou Mountains is about ten miles this side of the Oregon and California boundary; and the summit is about fifteen miles from Ashland on a direct line. Ashland is about twenty miles from the summit by the wagon road, but in a direct line it would be perhaps twelve or fifteen miles. Cottage Grove is approximately 140 miles from Portland. Roseburg by railroad is 198 miles from Portland. Ashland about 343 miles from Portland. He cannot speak from knowledge as to these lands in the Willamette Valley in their native state being covered with any kind of timber; he can only speak from information; that there was on his first appearance in the valley extensive growths of fir and oak, mostly second growth fir and oak grubs—scrub oak. These lands in the valley were not called timbered lands in any sense as compared with these lands in the mountains. The lands in the

valleys are such lands as, when cleared, make first class agricultural land, and the lands in the mountains, when they are cleared, would not be worth much, if anything. This second growth fir and oak grubs in the Willamette Valley is good for cord wood. He caused a statement of taxes that were paid upon this land prior to 1891 to be prepared as far as he could get it. P. A. Worthington had charge of the preparation of the data for that; he was acting under his direction for the Oregon and California Railroad Company. Defendants' Exhibit 321 in the computation of total taxes paid, total taxes per acre, average tax per acre per year, does not take into consideration any taxes paid prior to 1891. This exhibit includes taxes from 1891 to 1911. The assessment rolls as shown are attached to a certificate for the Multnomah County assessment. The other forms for the other counties were prepared in his office on the usual form that the Company filled out for furnishing the Assessors with a list of these properties, and were filled out for the clerks to compare with their tax rolls and certify to the correctness thereof to save time. The "Port of Portland" shown on the tax roll for Multnomah County is local to that county and that form does not obtain elsewhere, excepting where there are different ports in different counties. Some counties do not have any. Taxpayers are allowed to pay half the taxes prior to the first Monday in April and the next half prior to the first Monday in October, if they so elect. If they are paid prior to the 15th of March a three per cent rebate is allowed, equivalent to six per cent interest

on the money. This is at the election of the taxpayer. He has caused to be prepared a summary of the census returns. Defendants' Exhibit 322 is a typewritten statement showing the population of certain places at each census for which there were returns for 1860, 1870 and 1880, and a printed slip giving the population of each of the counties in Oregon from 1850 to 1900 furnished by E. Dana Durand, Director of the Bureau of the Census, Department of Commerce and Labor, at Washington. Whereupon defendants offered the said exhibit as Defendants' Exhibit 322 in evidence to which complainant objected as incompetent, irrelevant and immaterial, which exhibit was received in evidence, and is hereinafter set out and described and made a part of this Statement of the Evidence and identified as such. Whereupon witness further testified that he had caused to be prepared Defendants' Exhibit 323, showing the population of certain counties and towns for the years 1890, 1900 and 1910 and the same is a correct summary of the census for the various years named to the best of his judgment and knowledge. This was furnished to him by Seneca Beach, who was superintendent of the census for Oregon. Whereupon defendants offered in evidence Defendants' Exhibit 323, to which complainant objected as incompetent, irrelevant and immaterial. Which Exhibit was received in evidence, and is hereinafter set out and described, and made a part of this Statement of the Evidence, identified as such. Whereupon witness further testified that Defendants' Exhibit 324, is a statement of the summaries of the assessment

rolls of the several counties of the state for the year 1911 as equalized by the county boards of equalization, and compiled by the Board of State Tax Commissioners of the State of Oregon as an official compilation, published by authority of the State of Oregon by the Secretary of State, of this State, and was furnished to him by the State Tax Board, and witness testified to the same effect with reference to Defendants' Exhibits 325, 326, 327, 328, 329 and 330; to which the complainant objected as incompetent, irrelevant and immaterial. Whereupon each of said exhibits was received in evidence, so marked respectively, and are hereinafter set out and described, and made a part of this Statement of the Evidence, identified as such. Whereupon witness further testified that Defendants' Exhibit 301, which purported to show the year, the acres, the valuation, the taxes paid for Benton County, Douglas County, Lane County, Linn County, Marion County, Washington County and Yamhill County, was prepared by P. A. Worthington, under his supervision. The lands referred to in this exhibit 331 are the unsold lands of the Oregon and California Railroad Company for the respective years in the various counties. The assessment of these lands in some of the counties was included with other property for taxation purposes. The tax figure represents the entire tax paid including rolling stock and road bed and other things. They were assessed in a lump. The assessors in those days did not seem to have as good a record as they have in these. He was able to ascertain from these statements the amount of taxes paid by the company

on its lands in the Congressional land grants, by going back and getting if he could, the taxes levied for that year and computing it on the valuation of the land, and by comparing it with the previous year where the land alone was assessed. That is, by taking the previous year and the succeeding years, where the land is assessed alone, and striking an average he could very nearly get it. Whereupon defendants offered in evidence Defendants' Exhibit 331, to which complainant objected as incompetent, irrelevant and immaterial; which was received in evidence and is hereinafter set out and described, and made a part of this Statement of the Evidence, marked Defendants' Exhibit 331, identified as such. Whereupon on cross-examination witness further testified, that he had lived in Oregon about 31 years, had farmed a little since that; served as deputy sheriff four years; Special Indian Agent of the Government for three years; Railroad Commissioner nearly six years and with the Railroad Company for twelve years; the balance of the time he edited a newspaper. When he first came to Oregon he took a bunch grass ranch in Eastern Oregon and farmed that for two years. Thirteen or fourteen years ago he bought a farm in the Willamette Valley and farmed that for a period of six months. This bunch grass farm in Eastern Oregon is in an open country and the farm that he purchased in the Willamette Valley had 27 acres of it improved and the rest of it was timber. It was located in Clackamas County, but he cannot give the description of it, section, township and range. It was just below the mouth of the

Molalla, on the west side of the Willamette River, three miles straight out from Canby, and then across the river. He lived six months on this farm, cleared up six acres, and hauled rails and sold the land. He has been in the employ of the Railroad Company nearly 12 years and is still in its employ. Whereupon on redirect examination witness further testified that he had made a computation of the average assessed value per acre of these lands from 1892 down to and including 1911, both inclusive, based upon the assessment rolls and the assessment of the property and the taxes paid, and prepared this Defendants' Exhibit 359, purporting to show the year, the average value per acre from 1892 down to and including 1911, and showing the highest assessed value of any lands in Columbia County and the lowest in Tillamook County, and it is a correct showing from the records of the company. Whereupon defendants offered said exhibit marked Defendants' Exhibit 359 in evidence. Whereupon the witness further testified that he took Columbia and Tillamook Counties because they were the highest and lowest average assessment for the year 1911. Whereupon complainant objected to the introduction of said exhibit as incompetent, irrelevant and immaterial, and that the amount of taxes is no defense in this suit. Whereupon said exhibit was received in evidence, and is hereinafter set out and described, and made a part of this Statement of the Evidence, and identified as such. Whereupon witness on cross-examination further testified that the average assessed valuation per acre during the year 1911, was the highest in Columbia Coun-

ty and the lowest in Tillamook County as compared with all of the counties within which these land grants are. He has been employed by the Railroad Company nearly 12 years as right of way agent, right of way and tax agent, special right of way agent and special tax agent and has had to do with the payment of taxes since 1904. He was in the tax and right of way office with J. W. Morrow, beginning in 1904, but his connection with it for the first two or three years was only incidental. His attention was given more especially to right of way matters. He knows that there was a system in effect with reference to the listing of lands for taxation, segregating those that were subject to contracts from those that were not subject to contracts, but whether that system had just been inaugurated or whether it had been in effect prior to that time he could not say. He thinks he has had enough to do with the matter of taxes on these lands since 1905 so that he can speak with reference to the general methods pursued by the Company. He does not think that the Company ever objected to the assessment of any of these lands above a valuation of $2.50 per acre on the ground that that was the limit of the interest of the Company in the lands. There was not to his knowledge any effort made to keep the assessment down to the point where the Government contends was the extent of the interest of the Company. The Railroad Company handled the subject upon the theory that it was the absolute owner of the lands, without reference to these restrictions in the granting acts. The only thing that it has been contending for was to see

that the land was assessed in about the same proportion as other lands of like value and no effort was made to avoid assessment above $2.50 per acre. He realizes that if the assessed valuation of these lands had since the year 1904 been kept down to not exceeding $2.50 per acre that the amount of the total taxes paid by the Railroad Company would be very greatly reduced. It is a fact that $1,637,314.69 have been paid since the year 1904, not taking into account the present year (1912) as against $737,601.12 paid down to and including the year 1904. These figures include all the taxes paid by the Railroad Company up to this time; that is the amount relating to the years 1905 to 1911 inclusive, included all taxes paid down to the present time, the taxes for the year 1912 not being due until March, 1913.

"A. Prior to 1891 the record of taxes paid is exceedingly difficult to obtain from the fact that some of the counties did not begin to assess granted lands until 1890, and in other of the counties the taxes are included with property such as roadbed and station grounds, so that the taxes on the lands can only be approximated. From the best available data, I find that prior to the year 1891 we paid in Benton County $2,546.42; Douglas County approximately $4,400.00; Jackson County, $40,878.22; Josephine County, $100.00; Lane County, $4,816.26; Linn, $1,400.00; Marion, $2,076.32; Multnomah, $723.40; Washington, $1456.56; Yamhill, $1,530.34, or a total of $59,927.52. From 1891 to 1904, inclusive, we paid $737,601.12; from 1905 to 1911, inclusive, $1,637,314.69, or a grand total of $2,434,843.33.

In 1911 the holdings of the Company were 2,119,927 acres, so that, on this acreage, the taxes paid would average $1.15 per acre. From 1874 to 1898, inclusive, the taxes paid were $326,420.61. In the latter year the holdings represented 2,322,084 acres, so that the taxes paid to that time would average within a very small fraction of 14c an acre. From 1874 to 1907, inclusive, the taxes paid were $1,208,833.86 or 58c an acre on 2,073,415 acres then owned. From 1908 to 1911, inclusive, we paid $1,266,009.47, or 57c an acre on 2,119,927 acres owned in the latter year. In the earlier years when the assessors began assessing the granted lands of the company, the valuation placed thereon was about 40c an acre in 1874, gradually increasing, and in but few instances exceeding $1.00 an acre as late as 1890."

Whereupon witness further testified, that he has computed the average amount of the taxes paid during these several periods with reference to the holdings of the company from time to time. If the taxes were apportioned among all of the lands that inured to the Railroad Company under its grant, including approximately 820,000 acres that have been heretofore sold and 2,300,000 acres that are involved in the present suit, the average tax per acre would be a little less as to the unsold lands. The taxes per acre prior to 1905, for instance, was very light, and if those acres were taken off and the taxes paid to that time were deducted from it it would not make a very material difference, but would make some difference. The gross amount of lands appearing to have inured to the Railroad Company under

these grants is 3,182,169.57 acres. Apportioning the total taxes paid by the Railroad Company down to this date, that is, apportioning the total taxes among all the lands that inured under the grant instead of the present holdings of the company, the average tax per acre is a fraction over 76 cents, figured on the basis of 3,000,000 acres and over. The average tax per acre on the total amount paid, prior to the institution of this suit on September 4, 1908, computing the average with reference to the total amount of lands which inured to the company under its grant, instead of the present holdings of the company, or the holdings of the company at the time this suit was instituted is a very little less than 38 cents per acre; making the same deduction with reference to the total amount of taxes paid down to the year 1904, and including that year, the average tax per acre paid would be less than 25 cents per acre, and making the computation with reference to the total quantity of land which inured under the grant, that is 3,182,-169.57 acres instead of the holdings of the company in the year 1904. More than one-half of all the taxes that have been paid by the company on these lands, from the beginning down to the present time have been paid since the institution of this suit. Whereupon on redirect examination witness further testified, that since 1908, including that year, most of the counties in which these lands are situated, have employed cruisers and have cruised the timber lands of the company in these various counties, including other lands of like character, which has resulted in largely increased assessments, not

only of the company's lands, but all other lands of that character. In making distribution or apportioning this tax per acre on the total lands inuring to the grant,—3,182,169.57 acres,—it is his understanding there would be included the lands that have been sold and deeded from time to time from the beginning down to date, that is, that the acreage 3,182,169.57 acres is the total number of acres in the grant. After these lands are conveyed to others, aside from the executory contracts of sale, by which the vendees assume the payment of the taxes as between the company and the county, the owners would pay these taxes on these lands, and the company would have no record of it in its disbursements. The owners would pay the taxes when the lands are deeded, and the taxes paid by the owners would not appear in the figures which the company charges as having paid on the grant. That would be stricken from the list. That would be true as to the executory contracts where the parties paid the taxes. Whereupon upon recross examination, witness further testified, that this computation of his, has been made from the records in the office since 1892. When the company makes a statement to the sheriff for the payment of taxes, for each county, every subdivision that it pays on, is included in the receipt. The company keeps duplicates of these, in the office and these reports are made from those duplicates? He has simply added together the amount of those receipts for each year in each county. The amounts paid by the company on lands that were subject to contracts, and then the amounts so paid charged against the purchasers, seem to

be very small. There have been about two or three instances since he has been handling it direct, and they are small amounts. Where the purchaser or the owner of the contract had not paid and allowed the tax to become delinquent, the company would pay it. Whereupon on redirect examination the witness further testified, that he is tax and right of way agent of the Oregon and California Railroad Company and the Southern Pacific Company, and has checked up Defendants' Exhibit No. 7, printed in and part of the joint and several answer of the defendants in this case, being a "Statement showing right of way through unsold East Side Grant Lands required for Oregon and California Railroad," and it is a correct reservation as made by the company. There are some extra widths that are required for meeting special conditions. As right of way agent he could say that that was reasonably necessary for the operation of this railroad. The tract described as "North half of Section 15, Township 33 South, Range 6 West. Reserve entire half section for reconstruction of railroad on account of change of line," is at the point just immediately south of Tunnel No. 9, where the road is constructed largely upon trestles and cuts through points of the hill. It is contemplated to change the line, taking out those curves and trestles, and a large amount of the land will be needed for borrow material. The company has not fully determined just where the relocated line will be. Whereupon, upon cross examination, witness further testified, that the Railroad Company has set this apart so that it will not be included

in any of the sales made of any of the granted lands, until after these changes are made, and it sees just what it needs out of that half section. All of these other reservations have reference to the permanent track and for the most part consists of 100 feet on each side of the track, which gives the railroad company a continuous right of way through that part of the state, at least of 100 feet on each side of the track, connecting it up with the public lands which it obtained, and includes the same general width of right of way on the odd numbered sections which it obtained in the even numbered sections of the grant.

Whereupon defendants offered in evidence Defendants' Exhibit No. 7 to the answer, in connection with the testimony of the witness, to which complainant objected as immaterial and irrelevant; which said Exhibit No. 7 is attached to and made a part of the joint and several answer of said Defendants in this suit, and designated as Exhibit No. 7 of said answer.

Whereupon P. A. WORTHINGTON, called as a witness on behalf of defendants, being duly sworn, testified that he is at present employed by the Southern Pacific Company and has been specially employed by Mr. Eddy of the Tax Department of the Oregon and California Railroad Company for the last 30 days going to the different county seats and checking the rolls and looking over the tax records all that he could find in the different counties. His purpose was to find what the records disclosed as to the amount of taxes paid by the

Oregon and California Railroad Company on its congressional lands in the different counties, referring to the lands described in the bill of complaint in this cause granted to the predecessors of the Oregon and California Railroad Company under the Act of July 25, 1866 and the Act of May 4, 1870. These certified copies of the assessment rolls for the year 1911 of the Congressional lands of the Company for the various counties include unpatented lands unsold, primary; these are in addition, as he understands, to the lands described in this suit. He found out by checking over the amount of land described in the suit, that these are in addition to those lands, and that would account for the fact that the Company apparently is paying on some unpatented unsold primary lands, that are not included in this suit and makes the difference between the acreage footing of say Clackamas County as shown in "Defendants' Exhibit 318" and as shown by the bill of complaint. In doing the work of preparing this statement in "Defendants' Exhibit 318" he checked with the officers where he could get them to assist him and at times went through and compared them with their roll and checked them over himself, and made the balances and saw that they balanced with the roll. These statements are correct upon his own knowledge, from the rolls officially on file with the sheriff or clerk of the respective counties. An examination of the headings of "Defendants' Exhibit 318" shows that the sheriffs or clerks certified in the major part of those outside of Multnomah County to that part of the roll which pertains only to the Congres-

sional lands, the valuation and taxes thereon, but do not go into the merits of the school districts and various other items that are on the roll generally. They did not use the top of the roll which is usually printed on these forms of blanks, the rolls are furnished to the various counties, like Multnomah for instance, by the State. That form is the form furnished by the State for different assessments and they are uniform for each county. There may be some minor changes as for the different ports in different sections of the State. He prepared personally "Defendants' Exhibit 331" from the records as he found them in the several counties and these statements are correct as found upon the records of the different counties and were taken from the assessment rolls—some of them—all that he had would be from the assessor's rolls and sometimes he would find the tax rolls in the hands of the sheriff. He found the records in many instances in the attics, piled away in some corner of the vault and very hard to find, and in some cases they could not be found at all, but he examined all the records that he could find in the counties named in the statement. Referring to the memorandum "No evidence that this was paid" referring to Lane County assessment for 1890 stating the number of acres, valuation and tax, witness testified that he found on the roll opposite the name and tax as to the other items marked the word "paid." In that particular instance he found the value was carried out and the number of acres, but there was no note on the margin of the book showing that the tax had been paid. Upon further investigation his

attention was called to the case of the Oregon and California Railroad Company against Lane County and James E. Noland, Sheriff, reported in 23 Oregon, to the effect that that year's assessment, made by the sheriff, was involved in litigation and resulted in a suit so that it appears that for 1890 a part of the taxes on these lands were paid and a part apparently unpaid, as shown by the roll, and that the reason of the sheriff's assessment was that it was an assessment upon indemnity lands that had not been selected that the sheriff made. Where the items shows the words "Included with other property" that means that the road bed or the station grounds and rolling stock of the Company were included. These were all carried in one column and he could not segregate them to tell how much of it was on the land without going back and getting the levy of that year and making a calculation. He found this the way in which the assessment was carried on the roll for Marion County. He has made a computation as best he could from these records and from "Defendants' Exhibit 331" to show what taxes have been paid by the Oregon and California Railroad Company on its Congressional lands from 1873 down to 1890, both years inclusive, and the result of his computation is that in Benton County the average number of acres assessed from 1873 to 1890 were 9753 acres and the tax paid $2546.42, the average tax per acre 26 cents. In Lane County from 1874 to 1890, the average number of acres assessed for the time were 52,000 acres, taxes paid $4816.26, the average tax per acre 9 cents. Linn County, from 1883 to 1890, the aver-

age acres assessed were 28,714 acres, and the tax was $1400.00, average tax per acre about 4.8 cents. From 1883 to 1890 Washington County, the average number of acres of land assessed was 5360 acres and the tax $1456.56, or an average tax per acre of 27 cents. Yamhill County, from 1877 to 1890, 11106 acres was the average assessment and the tax was $1530.34 or 13 cents per acre. This is substantially correct as shown by the assessment rolls and by "Defendants' Exhibit 331." Lincoln County was carved out of Benton County since 1891. It is his understanding that the lands had not been patented or selected by the Railroad Company and that was why these lands did not appear upon the rolls earlier. He has undertaken to show by "Defendants' Exhibit 331" all that he was able to find in these various counties and his search was confined to the counties disclosed in "Defendants' Exhibit 331." He has made an investigation and search of the records of Multnomah County prior to 1891 to see whether the lands in Multnomah County were withheld from taxation or assessment on account of the suit of the United States against the Oregon and California Railroad Company, Hurlburt and Evans and the record shows that the taxes were paid from 1875 to 1890 and the lands were not omitted from assessment and taxation on account of that suit. That suit was after the date mentioned by him along in 1893. He prepared "Defendants' Exhibit 352." These figures are copied direct from the records of Multnomah County and are correct.

Whereupon defendants offered in evidence "De-

fendants' Exhibit 352," to which complainant objected as incompetent, irrelevant and immaterial, which exhibit was received in evidence and is hereinafter set out and described and made a part of this Statement of the Evidence and identified as such.

Whereupon R. A. BOOTH, called as a witness on behalf of defendants, and being first duly sworn, testified that he resides at Eugene, Oregon, and that "Defendants' Exhibit 332," being two maps purporting to show the lands of the Booth-Kelly Lumber Company in red, and the lands of the Wentworth Company in green, were prepared in the office of the Booth-Kelly Lumber Company under his direction. He is a shareholder and director of the Booth-Kelly Lumber Company, and is familiar with the holdings of that company and the Wentworth lands, and believes these maps to be accurate.

Whereupon counsel for complainant objected to the testimony of this witness relating to the character of the lands and their values, within the limits of these grants involved in this suit as incompetent, irrelevant and immaterial, and it was stipulated that this objection shall be considered as taken and made to all of the testimony of this witness on this subject.

Whereupon witness testified that these lands of the Booth-Kelly Lumber Company thus indicated on these maps, are chiefly valuable for their timber—except those that have been cut over. He does not know the name of the holding company of the lands colored in green,

known as the Wentworth lands, but his relation to these lands in organizing them into a fire district when he was manager of the Booth-Kelly Lumber Company, was with Mr. Wentworth of Chicago, who, he understands, is still interested in the lands. His understanding is now that they are under the care of L. J. Wentworth of the Portland Lumber Company in Portland, Oregon. These lands are chiefly valuable for their timber. Speaking of the character of these lands, with the timber cut off, they are ordinarily termed stump lands, the stumps still remain and all of the heavy debris such as does not burn readily with fires that are run over them for the purpose of clearing them as well as they reasonably and easily can be done for the purpose of protecting the remaining forest; they are hillsides, mountainous. The lands of the Booth-Kelly Lumber Company now owned in Lane County and in Linn County adjoining those in Lane, a bit more than half of them, or about 75,300 acres out of a total of about 136,000 acres, were acquired from the Oregon and California Railroad Company, and were originally part of this grant to that Company. He could not say, but Mr. Dixon could say, what proportion of this holding thus acquired from the Oregon and California Railroad Company has been completely logged off. The timber lands owned by the Booth-Kelly Lumber Company, as shown on these maps, are in the western foothills of the Cascade Range. They are along the small creeks which are tributary to the Willamette River, the different prongs, and on the hillsides and ridges between the streams. They are all mountainous and

hilly lands, except such as they find on benches formed by old slides and erosions and the narrow creek bottoms. The soil varies. It is all more or less rocky. Some of it is dark alluvial soil on the benches. Some of it is red. Some of it is rocky ridges. It has no value except for the timber, where the timber is standing, because the light is excluded, and there is no growth of vegetation that is valuable. After they are cut off and the light debris burned, so as to give a coating of ash, they are good grazing lands. Grass grows readily wherever it is seeded, and they form good pasture lands. If it is seeded immediately after burned, with such tame grasses as are in ordinary use in that locality, they can all be used the greater portion of the year, if the timber is cut off and the debris burned and then seeded in the stumps. The high lands perhaps would be covered with snow during three or four months of the year, and only the lower lands could be used. From his knowledge and investigation, the cost of clearing these lands of the stumps to render them suitable for plowing, where there is any soil that could be adapted to pasturage or grazing or agricultural purposes of any kind, varies greatly because of the different number of trees on the ground and the different character of the soil in which they grow. It would range anywhere from $50 to $500 an acre.

Q. Now, let me put to you this question. Suppose that an intending settler should apply to purchase one of these quarter sections in the state of natue in which it was before any of this timber was cut off, and should offer to the company, seeking to purchase it, $2.50 an

acre under this act of April 10, 1869, go on the premises as an actual settler, and there to make his home as an actual settler, I wish you would state to the Court whether or not in your judgment such land is adapted or was adapted to actual settlement in quarter sections in that way.

Mr. Townsend: That is objected to as incompetent, irrelevant and immaterial and calling for a conclusion of the witness both upon a question of fact and law, and not being a subject that comes within the scope of expert testimony in any way.

A. It is not adapted to settlement, and settlers could not make a living on it until after the timber was removed because of shade excluding the light and preventing any vegetable growth.

Q. Would or would not such settler be able to make a living on these lands for himself, or for himself and family, without cutting and selling the timber therefrom?

A. He would not.

Q. What, then, is the chief value of these lands and of lands similarly situated in this grant?

A. In their virgin state?

Q. Yes, that is what I mean.

A. The lands to which I refer belonging to the company and those intermingled are chiefly valuable for their timber.

Q. What would you call these lands then, what class would you put them in, agricultural or timber or stone or grazing, or what?

A. Timber-lands.

Q. About what proportion of these lands belonging to the Booth-Kelly Lumber Company in your judgment are without any soil that would be useful for any purpose—I mean that are rocky or contain no soil of value or are unfit even after cleared and grubbed for agricultural purposes or grazing purposes?

A. The percentage that would not do for grazing is very small, practically all do for grazing except where there are rocky ridges and where it is too rocky to allow the grass to reach the soil; but the percentage of that is very small as far as our land is concerned.

Q. You say it is nearly all suitable for grazing after it has been cleared of the timber and the debris by burning, and after being seeded. Supose that a settler or a man buying one of these quarter sections of logged off land was expected to make his living by grazing on the quarter section, and was not permitted to have the outrange all over the country, you may state whether or not the grazing on this quarter section under these circumstances would be sufficiently good to enable him to suport himself or his family.

A. It would not be. It is not the custom for one one to use grazing lands unless they have some arable land to use in conjunction with it, so that they may provide winter feed; but I consider the lands splendid grazing lands, and he could rent them to others.

Q. About what rental could he get from them, as compared with the rental charged by the Forest Reserve, or do you know?

A. If they were seeded he could get from 50 cents to one dollar per year.

Q. Per acre?

A. Per acre, yes; and seeded.

Q. From whom could he get that—large herdsmen?

A. Yes, and the ranchmen who own stock.

Q. About what would it cost him to prepare this land for seeding and pasturage and to put it in grass, as you have indicated?

A. If he simply runs a fire over it the cost would be very slight, unless he was unfortunate in burning adjoining timber for which he might be liable. The fire spreads over it quickly, and perhaps would permit 70 to 80 per cent of it to be used for pasture, and the cost of the seed would be from $1.25 to $2.50 per acre, owing to the kind of grass and quantity that he sowed on it.

Q. And does that include the labor of seeding as well?

A. Yes, sir. I think so.

Q. Now, does this grass that you refer to in that way require reseeding anually, or is it like meadow or something of that kind that lasts for a number of years and then would have to be reseeded?

A. The custom, of course, or good custom, would be to have perennial grasses, those that don't require to be seeded often.

Q. Then they would simply be reseeded after they had run out?

A. Yes, sir.

Q. Like an ordinary meadow in bottom lands?

A. Yes, sir.

Witness further testified that he was familiar with the unsold lands of the Oregon and California Railroad Company in Lane County; some of them in Linn, Douglas and Josephine, and that the lands of the Booth-Kelly Lumber Company are similar to the remaining lands of the Oregon and California Railroad Company that are intermingled and lying in the same vicinities. He would call these unsold lands timber or burned over lands. They are essentially the same in soil or in rock or in topography, in a general way, as the lands of the Booth-Kelly Lumber Company, and he would say as to the ability of a settler to make a living on these lands in their native state, that the settler could not do it. Of course, by that, he means if the settler remains on the land all the time. It is a mere guess as to what is the present value of the best particular quarter section of these timbered lands, either unsold or belonging to the Booth-Kelly Lumber Company, measured by its market or commercial value. There is no market for the lands now. There is no call for lands in that locality except as the Booth-Kelly Lumber Company may be picking up

occasionally a claim that adjoins their own. He does not know of any lands being sold in the market in the ordinary way. The Booth-Kelly Lumber Company buys some lands. He could give something of an idea what it pays for them, meaning the Booth-Kelly Lumber Company. The highest price that he knows, of timber investors paying for this class of land per quarter section, taking the best quarter section in Lane County, is about $1.00 per thousand on a stumpage basis. There are quarter sections that would be worth $10,000 at that rate. There have been no sales of these timber lands in the vicinity of the lands of the Booth-Kelly Lumber Company that he can recall, where they paid as high as $10,000 per quarter. There have been, however, within the last year, lands sold in western Lane County at about the rate he has named. The price that he named is the extreme price so far as he is advised, but there have been quite large sales within the last year in the Siuslaw region. He knows that the Johnson-Wendling Lumber Company made a large purchase in Lane County in the last year. This concern is composed of G. X. Wendling, of San Francisco; two of the Johnsons, and the Fleischackers of banking interests in San Francisco and largely interested in power lines. He cannot tell how many acres these gentlemen purchased in the sale mentioned by him. In the papers it is frequently referred to as a billion and a quarter and a billion and a half feet, and he has seen the map. It covers, or at least it is a number of different townships, but the acreage he could not give. It would be considered a large purchase. The lands of

the Booth-Kelly Lumber Company were purchased from the Oregon and California Railroad Company between 1898 and 1902.

Q. I wish you would state, Mr. Booth, in your own way, whether or not at the time you made these purchases, or at the time they were made, by the Booth-Kelly Lumber Company, they were made in the usual and ordinary course of business and at the then market price. State the circumstances under which these purchases were made, and including your judgment as to whether or not the prices paid were at the time reasonable.

A. The parties who organized the Booth-Kelly Lumber Company had been operating for quite a good many years previously in Josephine County, and attention was first called to the fir timber at Saginaw in 1896. We had been operating about ten years in Josephine County on lands purchased from the Oregon and California Railroad Company and others, and came to Saginaw to look over the operations there of Mr. J. I. Jones in 1896, and soon thereafter leased his plant for one year, with privilege of buying. At that time these lands were involved because he had contracts running with the company and they were assigned to us. Within the year we exercised our right to purchase, took over the contracts and bought a few hundred acres additional lands in that locality. The price that we paid for the lands that were under the contract was the price at which they had been sold or bargained to Mr. Jones, and the price that we paid for the adjoining lands was the price that

was asked us when we applied for it. After about a year's operation, or during the close, about the close of 1898, we applied for other lands known now as the Wendling Basin. The lands were on the market then, had been frequently quoted from $6 to $6.50 an acre, and we entered into a contract in March, 1899, for 18,000 acres plus, at $7 an acre, is all that we were asked for them. In fact it was 50 cents per acre more than they had been quoted to us in the beginning of the negotiations, but our company was small and taking a less area than had first been discussed; the price was advanced 50 cents. During 1898 and for two or three years thereafter we made frequent purchases from the company, but purchased more of the company lands from others who had contracts with them. In this way we purchased all the lands, all of the company lands that are shown by these maps. And during the same period, and since, we have purchased the intervening even sections. The prices that we paid were the prices asked by the Railroad Company, and were open to all buyers so far as I know. We paid the usual market prices in the usual way.

Q. How did these lands compare in quality with the remaining unsold company lands in the vicinity?

A. Well, we aimed at all times to buy in compact bodies, and in the purchases that I refer to we did buy in compact body unless it was a place where lands were burned.

Q. Before you made these purchases did the Booth-Kelly Lumber Company inform itself by cruising or in

any way as to the timber character of these lands?

A. It did.

Q. In doing this, did it proceed in any other or different way from that of any prudent buyer of timber lands in western Oregon?

A. I think not. The lands were examined by members of the company and their cruisers, then written into a contract. Before examining, however, we would confer with the Railroad Companies as to whether the lands were sold and at what price they would be offered us, and ordinarily we were given time to cruise them.

Whereupon witness further testified that no consideration was ever extended or given to the Booth-Kelly Lumber Company that was not extended or given to every other timber buyer that sought to buy land from the Oregon and California Railroad Company. He could not give the average price per acre of these lands purchased from the Oregon and California Railroad Company which the Booth-Kelly Lumber Company paid, but he could give the price stated in the principal contracts. The increase in value of timber lands and timber holdings in all parts of western Oregon, since the purchase by the Booth-Kelly Lumber Company of these lands, has been quite marked. In fact Booth-Kelly Lumber Company was the first large buyer from the Oregon and California Railroad Company in the interior, to do an interstate business. The Booth-Kelly Lumber Company demonstrated that the timber had value and was a fair competitor with other fir timber

shipped from coast points. When that was known, buying became general. Large timber buyers have made investments in Western Oregon and now have holdings there, from Wisconsin, Michigan, Minnesota, Illinois, Iowa, and other points, and also by people in Oregon. He considers that the Booth-Kelly Lumber Company was the pioneer company in demonstrating the fact that these timber lands when accessible to transportation, had a value resulting from the manufacturing of the timber into lumber and its shipment. Then later investors from these states mentioned, gradually came into this market, and from that time, the market gradually appreciated. He can name quite a number of these people who have thus come from these states and made investments in various parts of Western Oregon in the timber sections: Charles Green, the Wentworths, the Wright-Blodgett people, various people from Saginaw, Michigan, the Danahers and others from Detroit, the Drew Timber Company, and many others. The investments of these people, extended to timber lands of Western Oregon in different localities, both within and without the grant. From the date of the organization and operation of the Booth-Kelly Lumber Company, the price of timber lands in Western Oregon has been gradually appreciating, and he thinks, it is continuing. This market has developed in all of the counties of Western Oregon where there are timber lands. Those who invest for the purpose of operation, either immediately or within a reasonable time, buy only within the influince of transportation facilities. There are others who buy for the pur-

pose of holding a long time who pay little regard to transportation facilities, but buy for investment purposes. Transportation facilities are the principal factor so far as properties are concerned; that is, transportation that in some way gets connection with the ocean or a rail line. He has lived in Oregon all his life, and most of the time in Western Oregon. He commenced lumbering first in 1880, and has been interested in it at all times since, and has been acquainted with the value of these timber lands, or their market value, or whatever value they may have had, from 1880 down to the present time. These timber lands of the Oregon and California Railroad Company had no market value about 1880 of consequence for timber purposes or otherwise. At times small tracks, 40 or 80 or 160 acres, were purchased by small mills for local use, and at the time in the 80's when the railroad was extended from Roseburg south, there was some little market developed in that way for railroad use, but not in any other way. He thinks that these lands first began to have a market value about 1898; that their purchase was the first of consequence. About 1898 all the principal valleys of Western Oregon had been settled in a general way, and these valleys were used mostly for agricultural and grazing purposes. The first large claims were taken under the Donation Land Act and subsequent acts for homesteaders, the pre-emption law and public entry. In 1898 there was little land in the valley belonging to the railroad companies. There was considerable in the foothills that was purchased for agricultural and grazing purposes. Prior to 1898 there

was no demand in the region of the holdings of the Booth-Kelly Lumber Company by purchasers, or by any one, for these timber lands of the Oregon and California Railroad Company. When Booth-Kelly Lumber Company went in there, these timber lands of the railroad company were all offered for sale. There had been no purchases of any consequence. The timber lands of Josephine County, were purchased earlier than those of the Willamette Valley. The timber lands there, were mostly covered with pine, and had uses different from fir, and the operations followed immediately there, after the completion of the railroad. The chief value of these lands was their timber. He was interested in the manufacture of sugar pine and other pine lumber at Grants Pass for a number of years. The concern was, Sugar Pine Door and Lumber Company. He became an employe in August, 1888, shareholder in 1889, secretary in 1890, and manager in 1895. They sold their business there, after the organization of the Booth-Kelly Lumber Company, he thinks, in 1903. Practically all the timber of the Sugar Pine Door and Lumber Company that it purchased, was logged off by 1903, and the Sugar Pine Door and Lumber Company was manufacturing lumber that it purchased from the mills. The Sugar Pine Door and Lumber Company manufactured sash, door and general finish from sugar and yellow pine, or what is now known as California white pine, and the bird's-eye pine was used in some high class finish. It also manufactured box shooks and things of that kind—that was the principal item of business. Most of these lands that

were owned by the Sugar Pine Door and Lumber Company were acquired from the Oregon and California Railroad Company.

Q. What would you say as to the character of the soil there, and as to the fitness for any particular use after the timber was removed?

A. The most of the pine that we operated was taken from the granite soils. It grows there on that class of land more than any other, at least in all the regions near the railroad where we operated. The soil has little value after the timber is removed. There is, however, a red soil in the country, in that section where the pine also grows, that is valuable for fruit purposes.

Q. What would it cost, roughly speaking, to take the stumps out of this land that you refer to in Josephine County, and to make it arable, where there is any soil for that purpose?

A. It would vary, I think, from $20 to $50 an acre. The trees are scattering, and there is but little underbrush.

Q. Less stumps per acre on that character of land than on the lands in Lane County?

A. Yes, and they are more easily removed.

Whereupon defendants offered and there was received in evidence Defendants' Exhibit 332, which is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness further testified—

Q. Mr. Booth, some testimony has been offered in this case from Mr. Charles W. Eberlein, and a report has been introduced in evidence written by Mr. Eberlein, on the subject of the agitation in Western Oregon, or in Oregon, to compel the Oregon and California Railroad Company to sell these unsold lands involved in this suit, and I think it is stated by Mr. Eberlein in substance that you had something to do with this matter. I deem it proper that you should make such statement on that subject as you care to make, and I will ask you therefore to state what, if any, connection you had with that matter, and what knowledge you have on the subject, stating the same in your own way.

A. Will I confine the statement to that phase of Mr. Eberlein's testimony to which you refer?

Q. For the present, yes.

Mr. Townsend: The Government objects to evidence of this character on the same ground that was urged during the examination of the witness Eberlein, namely, that it is incompetent, irrelevant and immaterial, the circumstances under which the Government instituted this suit being in no sense a defense existing in favor of the Railroad Company.

Mr. Fenton: Counsel for the defendants understand the objection is made, but deem it proper that the witness shall make such statement as he cares to make on this subject.

Mr. Townsend: Now, may it be understood that this

objection shall apply to all of the evidence of this witness upon the subject without renewing the same?

Mr. Fenton: Yes, it may be so understood.

A. Mr. Eberlein testified, as I understand it, that members of our company, and myself in particular, agitated the matter of forfeiture of the grant; that I had been at various meetings where there was such agitation, and that I had presided at one. The statement is unqualfiedly false.

Q. Mr. Eberlein somewhere in his testimony, I can't call particular attention to it, stated in substance and effect that these contracts made by the Oregon and California Railroad Company for the sale of these lands which were ultimately conveyed to the Booth-Kelly Lumber Company were improvidently made, and that certain officers of the Oregon and California Railroad Company, or certain employes of the company, were covertly or secretly interested in these contracts, or some of them, and that from his investigation of the matter he felt that the contracts were not made in good faith on the part of the Oregon and California Railroad Company, and that there were some favors of some kind extended to the Booth-Kelly Lumber Company for certain undefined reasons, and I think I recall asking him if certain particular officers whose names had been associated with the transaction were in this deal, to which he replied No, but that certain others were. I wish you would, in your own way, on behalf of yourself and on behalf of the Booth-Kelly Lumber Company, and on

behalf of the Oregon and California Railroad Company employes, state what the fact is in that respect, and whether or not any favors were extended, or any employes of the Oregon and California Railroad Company were interested, directly or indirectly, in this matter.

A. The best answer, I think, is to review the circumstances of the organization of the company and the purchases of the land. As stated before, the first purchase that we made of these lands (I refer now to the lands of the Booth-Kelly Lumber Company) was made from Mr. J. I. Jones. The company had not been organized, nor had any members of it had any acquaintance with Mr. Jones at the time of the initiation of this transaction. After acquainting ourselves somewhat with the manufacture of fir and its uses, and believing that a business could be built up by its manufacture, we brought the matter to the attention of a number of gentlemen whom we knew, and with whom we had business relations in California, and we talked to the principal officers of the company in relation to further operations, the uses of the materials, and the places where it could be marketed, and rates that would be given. This matter was taken up directly with Mr. C. P. Huntington, Mr. H. E. Huntington, Mr. George Crocker and Mr. William H. Mills. After negotiating with Mr. Mills for the lands in the Wendling Basin, which was the first purchase of consequence—

Q. That is in Lane County, I believe?

A. In Lane County, as shown on the map that has

been introduced—we agreed to purchase the lands at $7 per acre, which, as I stated a while ago, is 50 cents more than the price that was first asked, on account of our taking a less area than had been first discussed. The purpose of selling us the lands was to build up the transportation business of the road, and after the contract had been agreed to, and even after it had been written, we were not permitted to sign it until we had made an agreement for the manufacture and the transportation of the lumber. We made such agreement with Mr. C. P. Huntington simultaneously with the signing of the contract, and agreed to move over the rails of the company from Wendling, one point, not less than 2500 carloads of forest product within twelve months from the time that they would lay their rails to our mills. We purchased the right of way for that track, gave them the ties, and fulfilled our part of the contract. We have been operating since. As to whether it is improvident or not, the best answer is the condition of that community now. It is populous and prosperous, and ten-fold more settlers than there were at that time. We received no favors in it whatever.

Q. You say settlers—you mean people living in the country?

A. People living in that locality, employed in lumbering and supplying those who are employed in lumbering. There was no member of the company, of the railroad company, or of any other railroad company, interested then or at any other time or in any lands

that the company have owned or do own; that is to say, at any time that the company owned them. After the company had purchased as much land as its principal officers thought it should have, and a quantity sufficient to operate over an extended period of time, I called the attention to the directors to a body of land that was lying adjoining some that we had already purchased, and suggested that the company should own it. It was decided by the directors that they had purchased a sufficient quantity, and I then asked for permission to form a company to buy the lands so that they might be held in friendly hands. That was the last large purchase of lands made from the company in which I was interested, and I was one of 25 who purchased them. The purchase was made in the name of John F. Kelly, a trustee, and at the time the purchase was made there was no thought of any one in connection with the railroad being interested, but at a later time some of the employes of the company—

Q. Of the Southern Pacific Company?

A. Of the Southern Pacific Company, were interested, but the lands were eventually sold to the Booth-Kelly Lumber Company; but before they were, all the individual members sold their interests.

Q. I will ask you to state whether any officer or employe of the Oregon and California Railroad Company was interested, directly or indirectly, in this so-called Kelly contract, or in any of these lands that afterwards came to the Booth-Kelly Lumber Company.

A. Well, I think the parties were officers who were interested while they were held by Kelly.

Q. Well, I say the Oregon and California Railroad Company?

A. Oh, no, sir; they were not. I beg your pardon; none of them, or in any other lands owned by the Booth-Kelly Lumber Company.

Q. I wish particularly to inquire whether or not Mr. Richard Koehler, who was First Vice-President of the Oregon and California Railroad Company and General Manager of the Southern Pacific Company at that time, of the lines in Oregon, and who had been connected with the Oregon and California Railroad Company since 1874 down to I think 1904, had, directly or indirectly, any interest in any of these lands or in this contract.

A. Absolutely none.

Q. I will ask you whether George H. Andrews, Acting Land Agent and Secretary of the Oregon and California Railroad Company for a great many years, and who resigned September 15, 1904, and was succeeded by Mr. Charles W. Eberlein, and who had been with this company from the early days down, and who is now dead, had any interest in these lands or these contracts, directly or indirectly, or ever had?

A. He did not.

Q. I will ask you to state whether or not Mr. William F. Herrin, Chief Counsel of the Southern Pacific Company since 1894, down to the present time, had any

interest in these lands or contracts, directly or indirectly, or in any other way.

A. He did not.

Q. I will ask you whether or not Mr. William D. Fenton, who became counsel for this company in June, 1891, and who has continued in such relation up to the present time, ever had any interest, directly or indirectly, in these lands, or was connected, directly or indirectly, with the Booth-Kelly Lumber Company in any way.

A. He was not. Neither he nor any of the persons named ever had any discussion, and so far as I know any thought of such a thing.

Q. I will ask you to state whether Judge William Singer, Land Attorney of the Company, and connected with the Southern Pacific Company and the California and Oregon railroad, Central Pacific Railway Company and these companies since 1878, and continuously since, and still in such position, ever had any connection with Booth-Kelly Lumber Company or any interest in these lands, directly or indirectly.

A. None whatever.

Q. I will ask you to state whether or not any of these gentlemen, or all of them, because of any political relations to you or to any member of Booth-Kelly Lumber Company, ever exercised, attempted to exercise, or suggested to the Booth-Kelly Lumber Company, or to you, or you to them, any favors, concessions, undertakings or arrangement because of any political relations or otherwise.

A. Absolutely none.

Q. Then, as I understand, Booth-Kelly Lumber Company bought these lands from the Oregon and California Railroad Company in the same way as any other purchaser, and upon the same basis?

A. That is my understanding.

Q. Who was William H. Mills?

A. He was the Land Agent.

Q. Where was his office?

A. Located in San Francisco. The first purchase of consequence that we made was directly with him.

Q. Who fixed the price for the Oregon and California Railroad Company on these lands that were purchased through Mr. Mills?

A. Mr. Mills did. I would like to add, if I may be permitted—

Q. Go ahead.

A. That the majority of the lands formerly owned by the Railroad Company that were later purchased by us was purchased indirectly or purchased from parties who assigned contracts with the company, without any knowledge or initiation from us.

Q. These persons from whom you took assignments, were they any of the company's employes or persons interested?

A. They were not.

Q. And were these officers or any of them that

I have named interested in those contracts?

A. No, sir, or in any lands that we own or ever owned.

Q. I desire to call your attention to a statement contained in Mr. Eberlein's report, Defendants' Exhibit 309, found at page 80, which reads: "It may be asserted confidently that the present movement against the Oregon & California land grant was not instituted by persons wishing to settle, nor is it a movement for the general good." This report bears date May 1, 1908. "It has been brought on by agitation begun by certain large timber holding interests in Oregon for the sole and express purpose of compelling the railroad company to part with its timber holdings, in order that they might be acquired by these same timber holding interests. This fact has been well known by the land officers of the Oregon & California Railroad Company since the agitation was commenced, but it is brought to light clearly by the statement of Mr. A. C. Dixon of Oregon, an officer of the lumbering and timber holding corporation of the name of 'The Booth-Kelly Company,' before the Committee on Public Lands of the House of Representatives, on March 12, 1908. (See 'Hearings Held Before the Com. on the Pub. Lands,' etc., page 76), where he says: 'It was at a meeting of shippers, mostly lumbermen, that the question of disposal of lands still in the hands of the original grantees (Oregon & California Railroad Company) was first brought out in a public way, and the lumber interests were behind and favored every resolution on this sub-

ject adopted in the State and are still in hearty accord with the original purpose of the movement.' And, further: 'The Government, with all the agencies at its control, should secure their (the people's) rights from an offending corporation in a suit which we and other public-spirited citizens of our State have proposed and furthered continuously since it was first brought to public notice.' " This appears to be a quotation from the remarks of Mr. Dixon, set out at page 76 of a Statement of Mr. Dixon, made at the Hearings held before the Committee on the Public Lands of the House of Representatives, March 12 and 14, 1908, on Senate Resolution No. 48, instructing the Attorney General to institute certain suits, etc., published by the Government Printing Office at Washington, 1908; and I have verified the quotation from this statement of Mr. Dixon, as thus reported, and it seems to be an accurate copy of what Mr. Dixon is purported to have said. In view of Mr. Eberlein's statement in this report and his testimony elsewhere, that you attended and presided at one of these meetings, I wish you would state further, if you care to, what meetings, if any, you attended, where, and what was the purpose of these meetings, and what was the subject under consideration, whether you had anything to do with making this statement quoted from Mr. Dixon, or whether the Booth-Kelly Lumber Company, other than as represented by Mr. Dixon, so far as you know, took any such position.

A. I never attended any meeting that had for its purpose the discussion of the forfeiture of the grant, but

I attended one meeting in 1906 at Eugene that was called by the commercial organization at Cottage Grove. Their call was extended to the commercial bodies of the towns of the Willamette Valley. The meeting was quite largely attended in which they were discussing the proposed advance in rates, mainly what was known as the $3.10 rate to Bay points, but also the increase in the eastern rate.

Q. You mean lumber rates?

A. Lumber rates. I did not preside. I spoke at that meeting.

Q. What is the fact as to whether or not this meeting was called and attended mainly by persons who were interested in the manufacture and sale of lumber?

A. The call was a general one to people in the Willamette Valley. It was attended by quite a number of gentlemen from Portland, representing the transportation committee, as I think, of the Chamber of Commerce, and various other members of the commercial bodies of the Valley.

Q. Was there at that meeting under discussion the subject of compelling the Oregon and California Railroad Company to sell its unsold timber-lands?

A. Not so far as I recall.

Q. What was said, if anything, if you recall, at that meeting about an effort to be made to forfeit the grant for failure to sell the lands at all, or for failure to sell it in accord with this act of April 10, 1869, at

$2.50 an acre and to actual settlers, and in quantities not to exceed 160 acres?

A. Well, the matter discussed principally was the matter of rates on lumber, and so far as I recall nothing else. That is what I discussed.

Q. Was there or not any statement by any representative members there that the lumbermen should institute some method of reprisal looking towards forcing the company to sell these lands or to forfeit the grant if these rates were advanced? Was there not something of that kind said?

A. Nothing that I recall. It would have been absurd, of course, for the owners of timber-lands to urge forfeiture of the grant, when they would certainly know it would cloud their own titles.

Q. Well, at that time, Mr. Booth, isn't it true that the timber men, I mean the people who desired to invest in these lands, were opposed to the company's discontinuance of sale?

A. Well, I don't think that was so with timber men any more than other classes of people. There was a general remonstrance against it, and it extended to all classes of people, that it was not right and a mistaken policy, and so on.

Q. That is to say, to suspend the sales of the land?

A. To suspend the sales of the land.

Q. As they had been sold theretofore?

A. Yes, sir.

Q. Was there or not any particular demand voiced at that meeting, or any other, that these lands should be sold at $2.50 an acre to actual settlers in quantities not to exceed 160 acres?

A. There was not at that meeting, nor at any other meeting that I know of.

Q. The opposition, as I understand you, then, to the policy was because the lands were not open to sale, as they had been theretofore.

A. That is it.

Q. Did you or did you not have anything to do personally with the preparation of the joint memorial which was passed in February, 1907, by the Legislature of the State, introduced, I think, by Senator Mulit of Jackson County, other than to vote for it with all the other senators?

A. I had nothing to do with the preparation of it. I voted for it.

Q. The records of the Senate and of the House show that it was practically a unanimous vote on that measure. Was there or not any discussion in the Legislature on that subject?

A. I think there was. A number of senators spoke in favor of it.

Q. That was in February, 1907?

A. About that time, yes, sir. There was a general demand for it from the constituency all over Western Oregon.

Q. That demand was because the company had not continued to sell the lands as before?

A. Yes, sir. Now, if I may refer to a further statement there in connection with our company?

Q. Yes.

A. And the matter of agitation. I am informed that Mr. Eberlein said that we had threatened to have such measures introduced.

Q. I don't find that in the record. I don't think it is there.

A. I think it was in the newspapers.

Q. Well, I don't think it is in the evidence, but you may make your statement.

A. Because the company declined to sell us lands. That is not true, so far as I know. We never applied to the company for any lands that we did not purchase unless it might be two or three sections that were intermingled with ours. That was about the time the lands were withdrawn. But we never had any trouble with the company in any way in relation to the purchase of the lands—never any misunderstandings, and had no occasion whatever from that cause to agitate the forfeiture of the grant.

Q. I wish you would refresh my memory by stating who were the members of the Transportation Committee of the Chamber of Commerce that attended that meeting at Eugene to which you refer, in 1906.

A. Mr. Devers was there.

Q. A. H. Devers?

A. Yes, sir.

Q. H. Wittenberg?

A. I am not sure as to Mr. Wittenberg. Mr. Samuel Connell I remember. I don't know whether he was there as a member of the body, but I remember his being there. I don't think I can name any others, although I know there were several of them.

Q. Mr. Samuel Connell, I believe, at that time was in the manufacturing of lumber, the same kind of lumber, here in Portland?

A. Yes, sir; and I am inclined to think at that time he was Secretary of the Chamber of Commerce; if not he had been prior.

Q. Mr. Devers was a—

A. Member of the Committee.

Q. Member of the Committee. He was not in the lumber business.

A. No, sir; a grocer.

Q. He was a grocer?

A. Yes, sir.

Q. This meeting, then, was primarily to discuss a proposed increase of rates on lumber, common lumber, common green lumber, that was destined to Bay points in California, from $3.10 to a rate of about $5. Is that correct?

A. That is correct. I think also it had to do with

the advance of the eastern rate from 40 cents to a higher price.

Q. Fifty cents?

A. Yes, sir.

Q. And at that time the rates put in by the company, or threatened to be put in, or announced to be put in, were satisfactory to the Portland lumber manufacturers, who didn't use the railroad but who shipped by water, and were not satisfactory to the interior manufacturer?

A. That is correct.

Q. It was claimed, was it not, by the Booth-Kelly Lumber Company, that this rate of $3.10 had been put in by Mr. C. H. Markham about the time the Booth-Kelly Lumber Company established its business at Saginaw and Wendling, and that it was not a temporary rate but one that was to be continued? That was the claim, was it not?

A. The statements that have been made by members of the company, and by myself, were that it was a temporary rate when it was first made, but that after a year's time the rate had been tested, that it was satisfactory and was made permanent.

Q. Do you recall the fact that during that agitation of rate Mr. Stubbs, Traffic Manager, came to Oregon, and that there was some effort to agree on the restoration of that rate? He went to Wendling. He went over these properties with you and with other mem-

bers of the Booth-Kelly Lumber Company. Do you recall that circumstance?

A. I do.

Q. Do you recall that it was contended by the Company officials that the rate of $3.10 under the circumstances was not a compensatory rate, and that for that reason they ought to and should raise it; that it was afterwards litigated, and the rate was made $3.40?

A. Not just in the way you state it, Mr. Fenton.

Q. Well, just state it. I am stating from general recollection.

A. At that time our Wendling mill, the principal mill, was shut down, and Mr. Stubbs asked if we would operate it if the $3.10 rate was restored. We informed him that it would be, and he restored it on common green rough lumber, and we continued to operate. At a later time it was taken out and the $5 rate put in, and then it was litigated.

Q. Well, that is right. And what was the ultimate result of the litigation?

A. The rate was made $3.40.

Q. Do you recall that in that matter there was a difference of opinion among traffic officials in Oregon and traffic officials in San Francisco as to this controversy, and that the Oregon end of it, including Mr. Markham, wanted to maintain the $3.10 rate?

A. I do.

Q. That was a fact?

A. Mr. Markham wanted to maintain it, and other members. Mr. Stubbs was opposed but yielded.

Q. Now, then, that was the subject really under consideration at this meeting in Eugene in 1906, was it?

A. It was; and in connection with the eastern rate also.

Q. That is what I mean.

A. Yes, sir.

Q. In the discussion there do you recall that there was anything said or intimated by anybody as to the land matters?

A. Except indirectly. I remember this, that the establishment of the company's mills operating on its own lands was considered unfair to mill men.

Q. You refer now to the company's mills on—

A. The Wendling branch.

Q. On the Wendling branch, situated at Marcola?

A. Marcola, yes.

Q. Now, who considered it really a breach of good faith or an improper thing for the company to do under the circumstances? What manufacturing concern?

A. Well, as a matter of good faith I don't know that any one did, but it was very generally condemned; I think by all of us. I know it was by me.

Q. That is to say, the Booth-Kelly Lumber Company and other manufacturers felt that the company

ought not to engage in a business in which they were common carriers and in which others who were patrons of the road were making their living and making their profits, if any?

A. Yes; because these parties had purchased the company's lands, demonstrated that they were valuable, and were then operating and were at a disadvantage in selling if the company provided itself with its material.

Q. Now, then, that was a source of some irritation between the manufacturers and owners of timber-lands and the company?

A. It was a matter frequently talked about, yes.

Q. Now, did that give rise or occasion to the policy which later became generally supported by the public, leading to the attempt to forfeit the grant?

A. It might have been a factor, but I don't think a very material factor. Now, it was stated, if I may answer that more fully, in Mr. Eberlein's testimony that the Railroad Company was compelled to do this largely on account of the acts of the Booth-Kelly Lumber Company.

Q. On account of raising the price of ties?

A. Yes, and cancelling contracts for ties.

Q. What is the fact about that?

A. It is absolutely false. The Booth-Kelly Lumber Company never did cancel a contract with the Railroad Company, could not if it wanted to; but it frequently permitted contracts to be cancelled and never

had any trouble with the Railroad Company as to the sale of its product.

Q. Was there or not about that time a sharp advance in the price of ties by all dealers?

A. Yes, sir; in all kinds of lumber, not ties alone.

Q. What was the occasion of that sharp advance?

A. The extended markets and the general demand for lumber.

Q. Do you recall what was the price of ties about that time?

A. I do not.

Q. Mr. Booth, I show you what purports to be a certified copy of "An Act Supplementing the joint resolution of Congress approved April thirtieth, nineteen hundred and eight, entitled 'Joint resolution instructing the Attorney General to institute certain suits,' and so forth," which appears to be an Act of Congress, approved August 20, 1912, commonly known as the Innocent Purchasers Act, which, for the purpose of identification, may be marked Defendants' Exhibit 333. Do you recall the fact that such an act has been passed?

A. I do.

Whereupon witness further testified that the Booth-Kelly Lumber Company has a suit pending known as one of the forty-five Innocent Purchaser suits in this court, and that the lands involved in this suit and in another suit against John F. Kelly, Trustee, and a

third suit in which Booth-Kelly Lumber Company is interested, aggregate about seventy or seventy-five thousand acres, the entire purchase from the Oregon and California Railroad Company.

Whereupon defendants offered and there was received in evidence Defendants' Exhibit 333, which is hereinafter set out and described and made a part of this statement of the evidence, and identified as such.

Whereupon witness further testified that it was his understanding that Charles W. Eberlein testified that on account of some grievance of the Booth-Kelly Lumber Company, W. C. Hawley was induced to run for Congress for the First District, and to introduce the resolution of forfeiture, and that witness urged him to support it. This statement is not true, and witness never at any time suggested to Hawley that he should run for Congress, and never discussed the matter of forfeiture with him at any time prior to his election, or at any time prior to the introduction of the resolution known as the Fulton resolution. After that resolution was introduced, he talked to Hawley about it, at the time witness was a witness before the Interstate Commerce Commission, as it affected the purchasers of the grant. He had a short conversation with Hawley in which Hawley stated that the matter had not been very generally canvassed, and what would be done so far as innocent purchasers, if there were any innocent purchasers, had not been developed. Hawley made no statement in relation to his action in regard to this act. With that exception, he had no conversation with Haw-

ley as to this resolution, nor as to his action in the matter, nor even as to running for Congress.

Whereupon upon cross examination witness further testified that he had lived in Oregon 54 years, was born in Yamhill County. He had not lived all of his life west of the Cascades. He had been in Eastern Oregon about three years in the 70's, with that exception he had lived in Western Oregon, that is in that part of Oregon situated west of the summit of the Cascades, and for a number of years last past he has been quite familiar with the general industrial and commercial history of Western Oregon. Kelly was associated with him in the Sugar Pine Door and Lumber Company but Kelly was not a stockholder until 1895 when witness became interested in the subject of establishing a general milling business, the first place was Saginaw and Kelly was one of his associates. He first took an option at Saginaw from J. I. Jones, whose holdings consisted mostly of railroad lands, but the option also covered some even sections. They first took an option for the purchase or lease and a few months after that, they made a lease for 12 months with the option of buying within the life of the lease and they exercised the right to purchase during that year and purchased in 1897. Shortly thereafter, they extended their plans and commenced purchasing these other railroad lands mentioned by him. Their negotiations for the purchase of lands in the Mohawk Valley, that is for the first large holdings, were in the latter part of 1898, the contract was in March 1899, and from that time on until late in 1902, they

made other purchases. In the meantime they got several small contracts and two large ones, where the Railroad Company had sold lands to other purchasers. The large ones were from Amos Hyland, for lands tributary to the Middle Fork. The Hyland contract covered nearly 7000 acres of railroad lands. They purchased from him at the same time, some lands from the even numbered sections intervening the railroad lands. After they negotiated these contracts with the Railroad Company, they filled in their holdings as much as they could reasonably, by purchasing the intervening even numbered sections. These contracts where they purchased from other persons, were generally in other localities. The Hyland contract, being on the Middle Fork, was where they had no holdings of any consequence at that time and the Jones and Cook contracts were on the Brumbaugh River. It is a fact, generally speaking, that they first acquired the railroad holdings and afterwards picked out the even numbered sections intervening them, except where they made large purchases like the Hyland and Cook. The deal with them carried also even sections, but the Company added to them, even and odd sections from time to time. In the case of Mr. Hyland he owned quite a little of the even numbered sections then, where it was in the locality where he lived and had an extensive stock business. He owned many of the even sections and had purchased timber lands from his neighbors on the even sections. In the case of the Jones and Cook contracts it is true that they had purchased the odd numbered sections from the Railroad

Company and then filled in by acquiring the even numbered sections. A large part of these lands referred to by the witness in his testimony, after they have been logged off, can be at a comparatively slight expense, converted into very good pasture lands. That has actually been done as to some of the lands that have been logged off; that has been fairly demonstrated. There is a sufficient rainfall in that general vicinity to give reasonable assurance of annual crops without irrigation. Dairying is generally carried on in this general vicinity and is understood to be profitable and he thinks it is. This dairying industry, has reference to lands between these holdings of the Booth-Kelly Lumber Company and the railroad, as a rule in the little valleys on the edges of the foothills. There are ranchers as far east as the holdings of the Booth-Kelly Lumber Company. These lands of the Booth-Kelly Lumber Company could not be used for agricultural or dairying purposes, until the timber has been removed, then if they are seeded to tame grass they would make good pasture lands and of course a considerable portion of them would do for fruit, gardening and even agriculture, if they were cleared. While he does not know the fact beyond the State of Oregon, it is true, he thinks that the timber must first be removed before lands covered with evergreen forests, not of deciduous trees, can be used for any kind of agricultural pursuits, dairying or grain growing, or fruit growing or otherwise. Grass grows more or less among the oaks and maples and things of that sort. The timber of fir and pine lands, must first

be removed and this is true with reference to these particular lands. When he refers to these lands as timber lands, he refers to the first use that can be made of such lands, and he does not mean by that, to exclude the possible use of the lands after the removal of timber, for grazing and agricultural purposes and when he says that these lands could not be used for the purpose of settlement and that the settler could not maintain himself upon the lands, speaking generally, he means that the lands could not be put to any use that would maintain a settler while the timber was standing. The reasonable value of the timber would go a long ways towards clearing the land and assisting the settler in establishing a home there. If he had the privilege or had the opportunity of disposing of the timber while he was clearing his land, he could make settlement on it. He thinks that to some extent as the milling industry has proceeded in this vicinity, with which he is personally familiar, employes of the different milling companies working for these companies at the same time have prepared lands in the vicinity in which they worked, by grubbing up the stumps, referring to lands that have been logged over and have thus prepared for themselves homes in that general vicinity. That has taken place to some extent. It has in instances where members of families working for the lumber concerns and other members of the family are clearing up homes along the foothills in the brush lands and in places in cut over lands.

Whereupon witness further testified as follows:

Q. Is it not a fact that a number of families have established homes in that general vicinity by that method that you have just described? I refer to lands that were timbered but have been logged off.

A. Well, that is especially true of the lands in the lower foothills that were covered with timber that has been removed and is being removed for wood and hauled into towns. There is a lot of that in Lane County, and I think in other counties, settlements being made in that way, but not much of that from the lands that we own or lands as remote from towns as they.

Q. Well, that is owing to the fact that settlement has not yet reached those remote parts, rather than the fact that the lands could no be so used. Isn't that true?

A. Well, there has been no policy adopted, so far as I know, of people who have cut over the lands yet of disposing of them, and the opportunity has not been given in that locality for that reason. It could be done if the cut over lands were sold to them.

Whereupon witness further testified that the Booth-Kelly Lumber Company has discussed the policy of reforesting its lands, but had not yet adopted a policy as to cut over lands. Pending a decision on that point, the Company has not disposed of its cut over lands. He lived at Grants Pass 12 years and at Eugene or in the vicinity 13 years and about 10 years at different periods near Roseburg. He is familiar in a general way with the country from Eugene south, practically to the State Line, but not very familiar at the present time with

Jackson County but is with Josephine, Douglas and Lane Counties. His knowledge of the character of the soil in Josephine County and its susceptibility to cultivation and growing of vegetable products, was gained largely during his residence there. It is true, that since he left there, the granite soils of Josephine County are being exploited, the lands are being cleared and advertised and offered for sale and some of them sold, but so far as his knowledge extends, it has not been demonstrated that these granite lands were good for vegetable products. He was there recently, at their fair, going there to attend to business matters in relation to his brother's estate, as he frequently does, and he made considerable inquiry then and also of the probability of irrigating the lands near Grants Pass, for the purpose of ascertaining how it would affect values there of lands than he had under control for his brother's estate. He was shown some products that were said to be grown on granite soil, that were fairly good, but the general understanding was that without irrigation the granite would not produce well. He is familiar with those lands immediately around Grants Pass, so far as planting is concerned. He knows that these lands have been planted and planted to grapes, lands on the hill sides in granite soil in sight of Grants Pass but the grapes are not yet bearing. What they may have done on any of these soils there since he left, with the exception of that immeditaely around the town and along the railroad he gained from inquiry from others. As he has stated these granite soil lands would produce with sufficient mois-

ture from irrigation, but while there was plenty of water in close proximity, the cost of putting it on the granite lands was excessive and that had not been carried out yet to any great extent, but probably would be. He is positive that they will produce some sorts of vegetation with irrigation. That has been demonstrated. The meeting at Eugene referred to by him in his testimony, was brought about by the announced plan or purpose of the Railroad Company, to increase rates on milling products and that is what really brought forth the meeting. The milling industry in Western Oregon in those vicinities that are dependent upon the railroad for transportation, had very largely been built up, on the faith of the former rates that the railroad company had put in force. Markets had been established and mills erected and the entire industry, built up with reference to the existing transportation rates and he considered, that the territory south from Eugene to the State Line, within 30 or 40 miles of the railroad is dependent for transportation facilities upon the Southern Pacific Company, as lessee of the Oregon and California Railroad Company. It is a fact that about the same time that the Railroad Company threatened or gave notice in some way, that it was about to increase the rate on lumber, that it installed also at about the same time, mills of its own at Marcola.

Whereupon witness further testified as follows:

Q. Now, I will ask you if it is not a fact that the real reason that brought about this public remonstrance that you referred to yesterday, this general public de-

mand which resulted in the unanimous adoption of the joint memorial of the legislature of Oregon addressed to Congress and the executive officers of the National Government, was the general fact that the Railroad Company had a virtual monopoly of transportation from Eugene southerly to the State line, and owned nearly one-half of all of the lands tributary to its line of road, and that the policy that had been adopted by the Railroad Company to withhold its lands from sale had materially checked the industrial and commercial development of that part of the state, resulting in this popular remonstrance and protest that you referred to, and which subsequently induced the unanimous adoption of this joint memorial to Congress.

A. I understand the question, but there is a certain deduction made there that I am not quite sure about. I can answer it in a general way, I think, so far as my own opinions are concerned.

Q. You understand the question now is, whether or not that general condition did not exist and that it was the discussion of that general condition that brought about this popular remonstrance, resulting in the unanimous adoption by the legislature of the State of this joint memorial?

A. I think it is true that the memorial was the outgrowth of the action of the Railroad Company in withdrawing its lands from sale and in the disturbance of freight rates. So far as I know, the agitation came first and continued from the commercial organizations at

Cottage Grove, where the town and the community was largely dependent on lumbering, where many small mills had recently been established. I think that those two things were the principal causes of the memorial.

Q. Well, now, from your general knowledge of the industrial and commercial history of Western Oregon from Eugene southerly to the southern boundary line of the State, and especially the territory tributary to the line of railroad of the Oregon and California Railroad Company, is it not a fact that the withdrawal of those lands from sale by the Railroad Company, and the withholding of the lands by the Railroad Company did materially check the industrial and commercial development of that country?

A. I think that is true to some extent in the three counties named, more particularly in Josephine County. It was true in a less measure in Douglas because there is not a great deal of milling there, and in Lane because most of the milling concerns had provided themselves with timber; but it affected Josephine County directly and immediately.

Q. Was not that view publicly discussed in this general public discussion that you referred to, which brought forth the joint memorial of the Legislature, was not that one of the elements that entered into the discussion?

A. That is a claim that was very generally made.

Q. One of the principal problems that your com-

pany has had to contend with has been the subject of transportation. Is not that true?

A. Yes, sir.

Q. And that has led you to give general study to that subject and particularly with reference to the community wherein the holdings of the Booth-Kelly Lumber Company are situated?

A. Yes, sir.

Q. Well, is it not true that the Railroad Company has virtually a monopoly of transportation from Eugene southerly to the southern boundary line of the State, and has had since the construction of the railroad? I am speaking now with reference to the subject of transportation as applied to the practical development of the industrial and commercial resources of that territory.

A. They are the only general transportation company in the regions near the railroad. Of course in that part of Western Oregon west of the Coast Range it is not influenced by that directly.

Q. You refer now to the territory that may make use of the ports on the Oregon Coast?

A. Yes, sir.

Q. Well, that is limited to the lands situated west of the summit of the Coast Range, is it not?

A. Yes, sir.

Q. And by far the greater part of this land grant is situated east of the summit of the Coast Range.

A. Yes, sir; so far as it relates to their land grant the answer would be in the affirmative. I understood you to include all Western Oregon.

Q. Well, my question did include Western Oregon, and for the purpose of completing the record I will ask you to limit yourself to the territory within the exterior boundary lines of this land grant. Now, is it not true that that territory is at the present time wholly dependent upon this Railroad Company for transportation, and has been since the construction of this railroad?

A. All the transportation is controlled by them, or influenced by them.

Q. Now, in your judgment, Mr. Booth, what effect would it have upon the future industrial and commercial delevopment of the territory within the exterior boundary lines of this land grant from Eugene southerly to the southern boundary line of the State if the Railroad Company should permanently withhold these lands as a permanent estate existing in its favor? My question is, what effect in your judgment would that have upon the general development of the industrial and commercial resources of that territory? I forget now whether I included that in my former question, this of course being subject to the same objection that has already been interposed.

A. If the lands are not to be occupied it would retard the growth in a general way and prevent the normal increase of population. But it would depend largely

on what policy the railroad might adopt as to the lands in permitting them to be settled.

Q. Well, would it not give the Railroad Company the opportunity to entrench its monopoly of transportation by virtually a monopoly of production of the lands tributary to the railroad?

Q. Omitting now from consideration the lands that at the present time have passed from the Railroad Company?

A. That would be true if the Railroad Company removed the growth from their own lands and carried it over their own rails, or if they required settlers who might go on those lands to ship over their own rails. I do not know how it could be otherwise.

Q. But the ownership of the alternate sections, either even or odd, necessarily controls the industrial and commercial development of that country, does it not, by anybody, either the Railroad Company or anybody else?

A. It affects and retards it.

Q. Can there be any general development of this territory with which you are familiar within the exterior boundary lines of this railroad grant if the Railroad Company owns and holds virtually one-half of the lands situated in alternate sections, as this grant is, unless the Railroad Company will join in the effort to develop those industrial and commercial resources?

Q. Would it be practical to develop that country

with the odd numbered sections withheld from development by the Railroad Company?

A. If they hold the timber-lands in any region it will probably retard the milling from the even sections that are intermingled, but when the timber is removed from the even sections, or on the brush lands, or things of that sort, it might retard, but it would not prevent the settlement on the even sections.

Q. But bearing in mind the establishment of roads and schools and other necessary incidents to the development of any territory, it is true of this territory, the same as any other, is it not, that the withholding of the alternate sections from settlement or improvement or industrial use would materially check and retard the development of the territory generally?

A. Well, I think my answer is a fair one, that it will retard it but not prevent it entirely.

Q. As illustrating that point, you testified yesterday, did you not, that there is no market for the lands intervening the holdings of the Booth-Kelly Lumber Company except the Booth-Kelly Lumber Company itself. Nobody else is buying the lands intervening your holdings.

A. No, sir. I didn't testify that. It is not true.

Q. What did you say with reference to that?

A. I don't think the question was up. What I mean to say is that other people are purchasing the lands intervening so that we do not own on the even sections, have been doing so.

Q. You were asked yesterday as to the reasonable market price for the most valuable piece of land within your holdings. My understanding was that you testified that there was no present market for those lands except such as the Booth-Kelly Lumber Company itself purchased.

A. I did not mean to be so understood.

Q. Well, then, I either misunderstood you, or you misspoke. That was my understanding yesterday.

A. I understood the question to be the maximum value of any given claim. I think that that was repeated several times, that it should be the maximum value, and that is what I meant to respond to.

Q. But it is true, is it not, that where the lands in one or more townships are held, one-half of them in alternate sections by a single proprietor or owner, and the intervening sections in small quantities by a large number of holders, that the owner of one-half of the lands in alternate sections does to a large extent control the market value of those lands?

A. It has a very marked influence.

Q. It is difficult, is it not, to secure a purchaser for lands covered with timber, which are situated in isolated tracts, even as large as a section.

Mr. Fenton: Does your question apply to timberlands?

Mr. Townsend: Yes.

A. The market is quite active in a small way for

timber-lands anywhere within the vicinity of our holdings; that is to say, they are changing hands, from one to another, but not in a large way nor at a high price; not at such prices as I named yesterday as a maximum price. But if the odd sections are held by one concern there can be no large grouping of lands, and without the grouping or continuous ownership the milling industry cannot be profitably carried on.

Q. That is, with the many problems that confront the milling industry, including the establishment of logging roads and the logging off of the land itself, and in view of the amount of profit made out of the business, it is impracticable to attempt an enterprise of that kind on any large scale with reference to the alternate sections of any particular tract of land?

A. That is true.

Q. Now in the valleys, and even in some of the foothills, it is a fact, is it not, Mr. Booth, that in the early days prior to 1880 the early settlers actually burned the timber in order to make way for a settlement, because there was not then market for the timber itself?

A. Yes, that was done much later than 1880.

Q. What I mean is, that the settlements that have been made in the valleys and in the sloping foothills were made many years ago, in a great many instances, even where the settlers had to burn the timber and got no value for it at all?

A. Yes, sir."

Whereupon witness further testified that he, in connection with Frank H. Buck, president of the Booth-Kelly Lumber Company, negotiated most of these purchases of railroad lands, so far as the first purchases were concerned. Later, the negotiating was done almost wholly by himself. The negotiation of those purchases was about equally divided, perhaps with the officers of the Company at San Francisco and at Portland. Negotiation for the first large purchase was conducted at San Francisco, and that related particularly to the general policy that the Company should pursue. Negotiations for the smaller ones, perhaps, the greater number of all the smaller ones, were with the Portland office, and in one instance, perhaps, the matter was discussed with both offices. George H. Andrews represented the Portland office and at San Francisco, they dealt with William H. Mills. They discussed the policy of the Railroad Company with Mr. Huntington, as to the uses the Booth-Kelly Lumber Company should put the timber to, that it bought, and they stated to Huntington that they were buying this, for the purpose of manufacturing, and agreed to ship at once and as soon as the land should come into their possession to construct a mill and commence shipping at once. They gave Huntington the territory about where they expected to ship, but the land negotiations were with Mills. Negotiations opened with Andrews were carried to San Francisco in order to get final decision in only one instance, where the matter was taken up at both ends. That was by common censent and not to go over Andrews or anything of that sort. The con-

tract was finally signed by Andrews. Andrews was subject to the general supervision of the San Francisco office during that time. That is his understanding.

Whereupon on re-direct examination witness further testified that he did not testify that the lands of the Booth-Kelly Lumber Company were in the Mohawk Valley, he did not mean to so testify, but that the lands about Wendling are in the Mohawk water shed. The lands of the Booth-Kelly Lumber Company about Wendling are mountainous lands and are not in any valley. He testified that the dairying was mostly between the holdings of the Booth-Kelly Lumber Company and the railroad. That is, the railroad referred to by him was the main line running from Portland through Eugene to the California State Line, or such branch lines as the Wendling line. There is considerable dairying in the Mohawk Valley below the other mills, and that is what might be called an extension of the Willamette Valley country. It is true that the valley lands of the Willamette Valley and other valleys in Western Oregon were settled under the public land laws and were mainly cleared of timber and were agricultural in their character, in their original state, but it is true that along the small streams extending well up into the foothills and even up to the timber regions, settlements up to 12 or 15 years ago, the cleared area was extended, even homes made, by felling timber and burning it. These lands referred to by him are along the border of the sections and the small streams that are tributary to the different prongs of the Willamette. He did not think that he

said in his testimony that these timber lands had no value and now have no value excepting for timber that is on them, but he said and repeats, that that is their chief value. He thinks they have some value after the timber is removed. He thinks that the reforesting is entirely problematical, but it is demonstrated so far as their value as pasture is concerned. The men who own these timber lands, who have logged them off, in his region, are considering the question of what to do in that respect. The beginning of the market for timber was when the Booth-Kelly Lumber Company had demonstrated that by manufacturing the timber into lumber and shipping the same, there could be something realized out of the timber. The percent of their output affected by the $3.10 rate varied at different times. There was quite a good deal of disturbance about the $3.10 rate as he now recalls. It either was withdrawn or threatened to be withdrawn three different times. In their early work, he thinks as much as 30 to 40 percent of their output was influenced by it. This $3.10 rate applied to all classes and later and finally it applied on rough green common lumber. That was the final adjustment.

Whereupon witness further testified as follows:

Q. Now, then, the $3.10 rate as it affected this rough green common lumber only affected it from Willamette Valley points to Bay points in California?

A. Well, that situation is comparatively recent, Mr. Fenton. Our early milling in the beginning to the time to which you first referred, in 1898, and around

there, our output went largely to California and to points that were influenced by that rate, where it was used as base rate, and so on. But the change to the common green rough lumber was the final adjustment of the rate, and with an understanding between the Railroad Company and the shippers. But earlier the $3.10 rate applied to all classes of lumber.

Q. I understand. And this later understanding was when with reference to the first application of the $3.10 rate?

A. I cannot give you the exact date now.

Q. Well, you had not been long manufacturing until the understanding was had that this $3.10 rate was limited to the common rough green lumber?

A. Yes, we had manufactured quite a number of years and had manufactured extensively before it was ever disturbed; established all of our mills.

Q. Yes, I know; but it finally was limited to the class of lumber that you speak of, and was in operation for a good many years before there was an effort made to raise it to the $5.00 rate, about which the complaint was made in 1906.

A. The $3.10 rate was in operation for quite a good many years.

Q. That is what I mean.

A. Before there was an attempt to raise it.

Q. Yes.

A. That is true.

Q. Well, then, later it was applied only to the common lumber, common rough green lumber?

A. Yes, sir.

Q. And that was the situation when the effort was made to raise it to $5.00?

A. The final effort.

Q. Yes, by the company.

A. Yes, sir.

Whereupon witness further testified that there were copies in his office of some affidavits that were procured by the Booth-Kelly Lumber Company and submitted to the Public Lands Committee at Washington while the Congress was considering a bill to compromise with the purchasers involved in the 45 suits referred to in this record, which affidavits were submitted to the Public Lands Committee by Mr. Dixon. These related to the character of the lands and the cost of clearing.

Whereupon witness further testified as follows:

Q. These were—you might state generally—these related to the character of the lands, as I understand, and the cost of clearing?

A. Yes, sir.

Q. Suppose the Oregon and California Railroad Company had in 1906 or 1907 offered for sale all of these timbered lands to so-called actual settlers in quantities not exceeding 160 acres and at a price not exceeding $2.50 an acre, and had sold them to so-called actual

settlers or persons who would go actually and build a cabin and live on the land for six months, or whatever the time, three months, no time being fixed in the statute, and the title of the company had vested in these actual settlers, how long, in your judgment, Mr. Booth, would it have been until these actual settlers acquiring these lands at $2.50 an acre could have resold them to timber buyers and timber investors and mill men at a large advance; and how long would it have been until most of these lands would have passed into timber investors or timber men for the purpose of development?

Q. You may answer.

A. I think your question is at what time they could have done that?

Q. Yes; and what would they have done probably?

A. Well, I could answer it perhaps more accurately by referring to the conditions in the Mohawk or Wendling Basin. When we purchased the lands of the Railroad Company there about all of the even sections had been taken either by homesteaders or entrymen, under the Timber and Stone Act, but there were no residents in there except along Mill Creek, and as I recall now in two places where the lands had been cut over in part and the logs floated down the stream to Coburg, and there were two families living there, the families except the husband remaining on the property, but the husbands were away at work. And with that exception there was no one in that region. And of course they could not make a living on them, and did not attempt

it, and there was no opportunity given them until our mill was established there, which was about 1898.

Q. What became of the title to these even sections?

A. We purchased them.

Q. That is to say, their chief value was for the timber, and the party holding the title disposed of them for that purpose?

A. That is right.

Q. And in your judgment that would have been the result if these lands had been sold to actual settlers under this $2.50 an acre—

A. It is the result of all the lands we own.

Q. Well, from your knowledge of the character of the lands that you own, the same thing would apply to other lands in the grant of the same class?

A. Yes, sir.

Q. Now, then, would there have been any more of a commercial or industrial development if the company had sold these lands to these so-called actual settlers and required them to stay there on the land? Would that have been at all practicable or possible?

A. It would not have been, the class of lands to which we are referring.

Q. Then the only industrial development that would have resulted from the sale to actual settlers would have been the vesting of the title ultimately in timber investors to these lands, and their consequent

use in due time when they desired them to manufacture.

A. So far as it relates to these lands that is true.

Whereupon upon re-cross examination the witness further testified as follows:

Q. Now, it is a fact, is it not, Mr. Booth, that the milling industry in Oregon has been conducted, to a very great extent, under a system by which the millers purchase the timber instead of the land itself. That is true, is it not?

A. I think not; not in our locality.

Q. Well, it is true, is it not, that the timber on a stumpage basis will usually bring almost as much money as the title to the land itself, if there is a reasonable time given for the removal of the timber?

A. If it is purchased at a time that the timber could be removed that is true, but in many instances, of course, cases where it is purchased for an investment, they would not buy unless they had fee to the land. But if it is for the purpose of manufacturing, I think they would bring just about as much.

Q. The Forestry Service is doing that same thing today, selling the timber and reserving the fee to the Government, is it not?

A. Not in our locality; but it is more or less negotiating; but there have been no transactions made there that I know of, though there has been considerable talk of it.

Q. That is largely because the Forest Reserve lands

are more remote than other lands that are held by the mill owners, and therefore it is not a practical business proposition to purchase the timber within the Forest Reserves at the present time?

A. Principally because of the higher prices that they ask for their timber, and the restrictions in removing it.

Q. That is, the Forestry Service has been asking for a higher price than the real market value of stumpage in that vicinity?

A. Yes, and that other lands can be purchased for, and they have imposed restrictions.

Q. And in addition to that have imposed certain restrictions as to the removal of the timber and the clearing of brush, etc.

A. That is right.

Q. That makes it a less profitable business transaction for the mill operator?

A. That is right.

Q. Mr. Booth, in all of your dealings with the railroad people in the purchase of these lands, did any of them ever call your attention to this clause in the granting act which in terms prohibits sales except to actual settlers in quantities not greater than 160 acres to one purchaser, and for a price not exceeding $2.50 per acre?

A. They did not.

Q. Did you yourself know of them until after this agitation arose?

A. I did not.

Whereupon A. C. DIXON, called as a witness on behalf of defendants being first duly sworn testified that he resides at Eugene, Oregon, and is manager of the Booth-Kelly Lumber Company and has resided in Oregon twenty-three years, ten years in Jackson County, seven months in Josephine County and between twelve and thirteen years in Lane County. He was a student from 1889 to 1893 and has been engaged in the lumber business since 1893. He attended the public and high schools at Ashland and the normal school at Monmouth, but did not graduate at Monmouth. He was there in 1892 and 1893. His business career has been at Ashland, Grants Pass and at two or three different towns in Lane County. At Ashland, he was in the retail lumber business from 1893 to 1899 and the firm name was Norris & Company. He was in the retail business for the major portion of that time, about five years as Norris & Company and then under the firm name of Hicks and Dixon. They purchased a sawmill and continued to retail lumber and at the same time manufactured lumber. They also leased a claim. Their sawmill was about six miles south of Ashland, in the foothills of the Siskiyous and they manufactured pine and fir, mostly pine. He was connected with the Sugar Pine Door & Lumber Company in Grants Pass for about seven months as stockholder and working in the office under Mr. Booth, at the same time working in the Bank part of the time. The Sugar Pine Door & Lumber Company operated at Grants Pass and then sold out to other people. The operation is still going on there in some modified form.

The general character of the timber that was used there, was mostly pine. There were several small mills operating there, principally in the summer time, and closed down in the winter, and he could not state with any accuracy, the amount of the cut. His next lumbering experience was at Wendilng, Lane County, where he went in March, 1900, until August 1901 when he went to Coburg and was there until June 1905, and then went to Eugene, where he has been since. He is a stockholder and manager of the Booth-Kelly Lumber Company and has been its manager since February 1910. The majority of the stock of that Company is owned in Michigan, in the hands of parties who live in Michigan. John W. Blodgett is one of the large stockholders, and their Michigan headquarters or place of business, is at Grand Rapids. The cut of the mills of the Booth-Kelly Lumber Company, when they are running, is 175,000 feet a day of ten hours. One mill is idle, which if running would add about 40,000 feet a day to the cut. One of the mills was burned down last year, it was cutting a little over 100,000 feet a day. They have two mills now operating and one idle. They did have four. One of these mills operating is located at Wendling, one that is operating at Coburg, one at Saginaw that could be operated but is idle, and one at Springfield that is burned. He is more or less familiar with the lands of the Booth-Kelly Lumber Company and knows where they are located and thinks he is familiar with the character of the lands as to their being timbered or otherwise. These lands are chiefly valuable for the timber and he thinks

the Wentworth lands are chiefly valuable for timber, only he has not seen all of the Wentworth lands. He has been through some of them. It is his understanding that the Wentworth lands are purely timber lands. In his judgment, he would think the larger portion of the unsold lands of the Oregon and California Railroad Company involved in this litigation, are in the same general class. He was in attendance before the Committee on Public Lands of the House of Representatives, March 12 and 14, 1908, when the committee had under consideration Senate Resolution 48, instructing the Attorney General to institute a certain suit. He made no formal appearance before that Committee at that time. He made a written general statement in behalf of the Booth-Kelly Lumber Company directly, and not with any authority from any other Company, and as purchasers of these lands. He made the statement headed "Statement of Mr. A. C. Dixon, of Oregon" found at pages 76 and 77 of the printed "Hearings Held Before The Committee on the Public Lands of the House of Representatives, March 12 and 14, 1908, on S. Res. No. 48 Instructing the Attorney-General to Institute Certain Suits, etc." and that statement was according to the facts as he understood them.

Whereupon defendants offered in evidence that portion of this document set out at pages 76 and 77 purporting to be "Statement of Mr. A. C. Dixon of Oregon" including the front page of this document and the second page down to and including the word "Committee" and just preceding the words "The American Eagle."

To which complainant objected upon the ground that it is incompetent, irrelevant and immaterial, and not a proper method of examination, and consists largely of hearsay statements and conclusions of fact and law.

Whereupon there being no objection, said portion of said document so offered was received in evidence and read into the record instead of the original in words and figures as follows:

"HEARINGS

HELD BEFORE THE COMMITTEE ON THE PUBLIC LANDS OF THE HOUSE OF REPRESENTATIVES

MARCH 12 and 14, 1908

ON

S. RES. No. 48

INSTRUCTING THE ATTORNEY-GENERAL TO INSTITUTE CERTAIN SUITS, ETC.

WASHINGTON

GOVERNMENT PRINTING OFFICE

"INSTRUCTING THE ATTORNEY-GENERAL TO INSTITUTE CERTAIN SUITS.

COMMITTEE ON THE PUBLIC LANDS,
HOUSE OF REPRESENTATIVES,
Washington, D. C., Thursday, March 12, 1908.

The committee met at 10 o'clock a. m.

Present: Representatives Mondell (chairman), Volstead, Smith of California, Gronna, Howland, Reynolds, Hall, Hamilton, Ferris, Craig and Hammond.

Present also: Hon. William F. Englebright, Representative from California; B. D. Townsend, Esq.; Aldis B. Browne, Esq.; L. E. Payson, Esq.; J. B. Thompson, Esq.; W. S. Humphreys, Esq.; John W. Blodgett, Esq., and others.

The committee thereupon proceeded to the consideration of Senate Resolution No. 48, heretofore considered by a sub-committee.

The Chairman. The meeting this morning was called for the consideration of Senate Resolution No. 48. This resolution was referred to a subcommittee by the chairman for the consideration of certain legal questions; but since the appointment of that subcommittee other questions as to the equities of certain purchasers of the land in question have arisen which had not been presented at that time, involving questions of public policy. In view of that fact, without discharging or relieving the subcommittee, it was deemed best to have a hearing this morning before the full committee; and while we have not a quorum at this time, if there is no objection we will proceed to hear the gentlemen who are here for the purpose of presenting facts with regard to the resolution to the committee."

"STATEMENT OF MR. A. C. DIXON, OF OREGON.

Mr. Chairman, as one interested in the effect of Senate Resolution No. 48 I wish to address you briefly as to some phases of the question not fully presented at any of the hearings before your committee up to the present time.

In order to explain my position clearly and to indicate from what sources and in what manner I have gathered the information I wish to place in your hands, I will say that I went to Oregon when 15 years of age, and have lived there over seventeen years, and for fifteen years of that time have been engaged actively in the lumber business. A good portion of the few thousands of dollars I have been able to accumulate is invested in the Booth-Kelly Lumber Company, with which company I have been connected for nine years, purchasing a small interest therein long before the time Messrs. Blodgett, Hill, and other Michigan men came into our company. For several years past I have interested myself in transportation matters in the State of Oregon and have been very actively engaged in securing a railroad commission law in that State and in conducting several suits against the Harriman system before our State Commission and the Interstate Commerce Commission on account of what we claim are unjust and illegal rates on lumber maintained by these lines. By reason of my position as chairman of the committees in charge of these rate cases I have come in close contact

with the timber owners and mill men who are now deeply concerned by the measure your committee is deliberating on.

There are over 250 sawmills located along the line of the Oregon and California Railroad within the limits of the grant lands. These mills produce 600,000,000 feet of lumber per year, employing at least 8,000 men, with a yearly pay roll in excess of $4,800,000. The development of this industry, which may be considered a vast one when the sparsely settled condition of Oregon is understood, would never have assumed any proportion up to this time if the mill owners had not been able to buy grant lands and had not felt that they could purchase them from time to time as they needed the timber, for the following reasons:

These grant lands comprise practically every alternate section in the region the mills are located in; and if these lands are eliminated from the timber accessible to any mill, then between each 640 acres belonging to the operator there will be one mile in each direction of territory from which no timber can be taken and across which his logging roads can not be built or, assuring that they can be, from which he could secure no tonnage.

A glance at any township map will convince the most skeptical that no one could begin to operate under these circumstances. It therefore follows that the manufacturer must control or have access to timber in bodies more or less solid and united in character.

It was at a meeting of shippers, mostly lumbermen,

that the question of disposal of lands still in the hands of the original grantees was first brought out in a public way, and the lumber interests were behind and favored every resolution on this subject adopted in the state and are still in hearty accord with the original purpose of the movement, it being necessary for the perpetuation of their business, for the reasons stated above. It has never been contemplated that lands already sold and upon which development has been in progress for years should be taken from the present holders and again placed on the market. To do this would arrest development of the State and give its chief industry a blow from which it would perhaps never fully recover. To even attack the titles of the present holders would be almost as serious a matter, as during the time suit was being conducted none of the lands, either in odd or even numbered sections, could be logged.

As to development, within the time of my connection with my company we purchased 17,000 acres of grant lands in a body, the nearest point of which was 17 miles from a railroad. We furnished the ties and right of way, and the Southern Pacific Company built a road 17 miles in length, connecting the timber with a shipping point. I aided in construction of our Wendling mill at a place where there were less than a half dozen families within a radius of 5 miles, and the men of these families had to leave home a portion of each year to make a living for those dependent upon them. Now there is a town of 600 to 800 people at this point, with employment for 300 men, and along this 17-mile road are 10 sawmills where

there were formerly none, and the little valley is alive with the hum of industry and has developed beyond the dreams of those who were familiar with it ten years ago. Every acre of farming land in this valley has necessarily appreciated in value as these mills were built, and employment was furnished by them to large numbers of men.

I submit to you that, leaving aside all technical questions as to conditions subsequent, covenants, violation of contract, constructive notice, etc., we did, after using all possible business caution and as between men of honorable intention and fair dealing, innocently buy these lands in good faith, for value, and are the bona fide holders of same, and are the true settlers and developers of the State of Oregon, and our title to these lands should be quieted now, in the interests of the industries of Oregon and its further development and in the interests of fair play, justice to all, and in consideration of public policy in its broadest sense.

I have in the past and want to continue to interest myself in the development and welfare of the State, and can not bring myself to believe that the property and possession of myself and of friends who are similarly situated are to be placed in jeopardy in order that the Government, with all the agencies at its control, and the people thereof should secure their rights from an offending corporation in a suit which we and other public-spirited citizens of our State have proposed and furthered continuously since it was first brought to public notice and the primary intent of which we are still in hearty accord with.

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I hope that the resolution before you will be so reported that the lands still in the hands of the railroad company will be opened to settlement and development and that those already in process of development and in the hands of innocent purchasers will be in no way disturbed."

Whereupon witness further testified that at the time he made this statement he was acting directly for the Booth-Kelly Lumber Company and the statement was submitted to some of the principal stockholders of the Company and some other owners, or representatives of owners of these lands which had been purchased. The circumstances were, that the statement was submitted in lieu of an oral statement and for the purpose of presenting their ideas to the Committee. The statement "there are over 250 sawmills located along the line of the Oregon and California Railroad within the limits of the grant lands," is a correct statement. The information was compiled by the Secretary of the Oregon & Washington Lumber Manufacturers' Association and by Mr. George Cornwall, editor of The Timberman, at the request of the witness, as chairman of the Transportation Committee of that Association. He is not sure, but thinks that Edmund P. Sheldon was secretary of the Oregon & Washington Lumber Manufacturers' Association at that time, but they had had several secretaries and he is not certain as to who was secretary at that time. He thinks that the statement "These mills produce 600,000,000 feet of lumber per year, employing at least 8,000 men, with a yearly pay roll in excess of $4,800,000," was

fairly accurate and correct at that time. The information was prepared by these same men, as the result of replies to inquiries that had been sent to the mills through the Association where they were asked to report the capacity and cut of their mills and some of which was furnished by himself in regard to their own mills, based upon the best statistical information that he could verify by himself. Those figures were at that time approximately correct. Many of these mills were operating on lands acquired from the Railroad Company, the larger ones on lands acquired from the Railroad Company and the even sections. The smaller ones, some of them were very small, and only operated on one section during their entire existence, sometimes on the even and sometimes on the odd section. The fact stated in the statement that "The development of this industry, which may be considered a vast one when the sparsely settled condition of Oregon is understood, would never have assumed any proportion up to this time if the mill owners had not been able to buy grant lands and had not felt that they could purchase them from time to time as they needed the timber," is in his opinion just as stated, and the reason for it is that mills could not attain any size or do any considerable amount of business, if they confined their operations to the even numbered sections, because of the physical impracticability and almost impossibility of logging on alternate sections and leaving the intermediate sections standing. From an operating standpoint in the lumber business, it is economically best to have the holdings of the land in continuous solid bodies rather than

to be interrupted by holdings between different tracts that might be owned by the operating company. These granted lands are these involved in this suit against the purchasers, those that they were operating on, and referring to the statement "If the mill owners had not been able to buy grant lands and had not felt that they could purchase them from time to time as they needed the timber," witness says, that they could not have started on any considerable scale if they had not already purchased, or been able to purchase immediately, lands from the Oregon and California Railroad Company. They could not continue their operations only as they could purchase them later on, purchase more of them, and he thinks it is true that these unsold lands involved in this suit still owned by the Oregon and California Railroad Company would become a commercial necessity to the continued and further operation of these mills already located on the even sections or on granted lands already purchased. His statement would only apply to the timber lands because they would have no use for any others. The statement that "It was at a meeting of shippers, mostly lumbermen, that the question of disposal of the lands still in the hands of the original grantees was first brought out in a public way, and the lumber interests were behind and favored every resolution on this subject adopted in the State and are still in hearty accord with the original purpose of the movement, it being necessary for the perpetuation of their business, for the reasons stated above," is both accurate and truthful so far as he knows. He speaks from his own personal knowledge, except as

to any negative questions involved. He stated that that was the first meeting at which this was brought out in any public way and it was the first one of which he had any knowledge. That meeting was at Eugene. He thinks the statement "It has never been contemplated that lands already sold and upon which dvelopment has been in progress for years should be taken from the present holders and again placed on the market. To do this would arrest development of the State and give its chief industry a blow from which it would perhaps never fully recover," is correct. He made the statement that certain action had never been contemplated. He of course has no means of knowing what some people might have contemplated, but he never had heard of it, and it was not a matter of general knowledge and he thinks the statement is true now that that never was contemplated by people in general to disturb the owners and those in control of the property involved in these suits against the defendants. As to arresting the development of the industry he thinks that would go without saying. They could not operate without the timber lands. He is quite sure that it was the principal industry in the State at that time, in that section of the State at least. If they had been enjoined or prevented from cutting on these lands, practically all the large mills would have been compelled to close up. John W. Blodgett was one of the principal stockholders, not an officer, of the Booth-Kelly Lumber Company.

Whereupon the witness further testified as follows:

Q. I notice in this statement of Mr. Blodgett, at

page 100 of this document :

"The Chairman, Mr. Blodgett, while the question of the value of these lands would certainly not control in any action that the committee may take, still the question of value has been raised here a number of times, and just as a matter of interesting information, I think the committee would like to know as to the character of these lands generally; for instance, the character of the lands that your company own. Take your 70,000 acres and average them, and what do they run?

"Mr. Blodgett. Do you mean how many thousand feet per acre?

"The Chairman. Yes.

"Mr. Blodgett. Our lands were selected lands, of course, selected for the timber, and they represent, of course, a higher average than the average of the grant in that territory. I should say they ran perhaps 40,000 feet per acre.

"The Chairman. The entire 70,000 acres?

"Mr. Blodgett. Our lands, possibly 40,000 per acre; that is, they did average that originally. Of course we have cut a great many thousand acres."

What is your information on that subject, and how does it correspond with the statement of Mr. Blodgett?

Mr. Townsend: Objected to as incompetent, irrelevant and immaterial, and particularly upon the ground that it incorporates into the record the unsworn statement of Mr. Blodgett, and is therefore hearsay.

Q. You may answer.

A. I should say that his statement as to the stumpage per acre is probably slightly under the actual figures as demonstrated by the land we have cut off since that time. I have not made an accurate average. I should say perhaps it was 10 per cent too low.

Q. I notice in this same statement of Mr. Blodgett this:

"The Chairman. What is a fair estimate of the value of stumpage in that country in advance of the improvements you have put on to make them accessible?

"Mr. Blodgett. Well, in the boom time, existing about a year ago, I should say perhaps 75 to 80 or 90 cents per thousand feet, in large, compact bodies, large enough for an operation. That would not be true of an isolated tract of 160 acres, because 160 acres in that mountainous land of itself is of no value except speculative value."

What is your knowledge and judgment as to the accuracy of that statement and as to your own views on the subject?

A. I am not so very familiar with stumpage values at that time. I didn't at that time know any price as high as that being paid. And as far as it being an average of any prices we had ever paid or been paid in that section of the country, I think it was considerably above the average.

Q. How is the price now of stumpage on lands such

as the Booth-Kelly Company owns, or lands similarly situated?

A. That is a very difficult question to answer intelligently. I have been buying lands for the company for three years approximately. Have bought several thousand acres. The highest price that I have paid has been twenty-two dollars an acre, twenty-two dollars and some cents. I have not bought any large quantities at one time, however, probably 1100 or 1200 acres in one purchase is as much as I have bought.

Q. Do you know what the United States asks for its stumpage in the forest reserve in Oregon?

A. Not except through newspaper report and hearsay.

Q. I notice in this statement of Mr. Blodgett, page 101, this question :

"The Chairman. You are fairly familiar with that grant yourself, personally?

"Mr. Blodgett. Yes; I have traveled over quite a portion of it myself.

"The Chairman. It does not average in timber anything like as good as the lands you bought?

"Mr. Blodgett. No, sir. As soon as you get out of the Willamette Valley you run out of the fir country and run into the white pine or yellow or sugar pine. The land of the gentleman Mr. McKee represents is in the white and sugar pine. I have also inspected that land.

"The Chairman. That is good timber land?

"Mr. Blodgett. Yes, sir; excellent timber land. That was also selected timber land."

Now, what do you say as to the correctness of those statements of Mr. Blodgett, from your own knowledge?

Mr. Townsend: Objected to upon the same grounds urged before to questions incorporating portions of the statement of Mr. Blodgett, and on the further ground that the statement of Mr. Blodgett is not before the court and cannot be made the subject of contradictory or impeaching testimony, and this is not a proper method of eliciting testimony from the present witness.

A. I have seen part of the land owned by Mr. McKee's client. I have seen quite a good deal of the grant —not all of it by any means. I think his statement is correct. That is, that we have selected lands, and the other large timber companies have selected the best of the lands.

Q. I notice Mr. Blodgett, further interrogated by the Chairman, says:

"The Chairman. That is good timber land?

"Mr. Blodgett. Yes, sir; excellent timber land. That was also selected timber land.

"The Chairman. As heavy as yours?

"Mr. Blodgett. No, sir; because, as I say, sugar pine does not grow as heavy.

"The Chairman. Is it of higher or about as high stumpage value?

"Mr. Blodgett. It is of a little bit higher stumpage value, all things considered.

"The Chairman. Possibly a dollar?

"Mr. Blodgett. Yes, sir.

"The Chairman. It possibly would run as high as 35,000 to 40,000 feet?

"Mr. Blodgett. No, sir; white and sugar pine, an excellent yield of that is 20,000 feet."

Now, what do you say, from your own knowledge, as to the accuracy and correctness of that statement of Mr. Blodgett's?

A. I know nothing about the pine values in that particular section at that time. The statement as to stumpage to the acre, 20,000 feet being an excellent yield in pine, is correct.

Whereupon witness further testified that he thinks he knows, in a general way, the present market value of stumpage of white and sugar pine. It is another very difficult question to answer. It is from $1.00 a thousand to $2.50, and depends very largely upon accessibility to transportation and availability for immediate use. Arthur Hill, who appeared before this committee and made a statement was, probably at that time, the largest stockholder in the Booth-Kelly Lumber Company. He then lived at Saginaw, Mich., but is now dead. Probably with one or two others, Blodgett and the estate of Arthur Hill control a majority of the stock of the Booth-Kelly Lumber Company, although he is not sure. They are

very large holders of stock. No policy as to the best use of logged-off lands of the Booth-Kelly Lumber Company, has been settled upon. It has been actively discussed several times and he thinks covered by what the witness Booth said, discussing the policy of reforesting, the disposal to settlers, and the possibility of grazing and pasturing lands. He has no means of knowing what would become of the titles to these timber lands if the Company had sold them to actual settlers in quantities not exceeding 160 acres at a price not exceeding $2.50 per acre and had made these sales, say, in 1906. The titles that had been given to individuals before that time largely went into the hands of the lumber companies and timbermen. He has no personal knowledge of the lands that the so-called actual settlers have applied for excepting from newspaper reports and court records.

Whereupon the witness further testified as follows:

Q. Well, what would be, in your judgment, the value of the best quarter section of the unsold land of the Oregon and California Railroad Company? What would it be sold for at private sale without being forced, for the purposes of the timber holdings or the timber that is on the same, within your knowledge?

A. The best possible price that could be secured would be from some one who was operating close to that section, right up against it—could use the timber quickly—you said quarter section, or section?

Q. Yes, 160 acres of the best timber land that is

left.

A. I should say from eight to ten thousand dollars.

Q. I have had submitted to me, as representing a small mill company known as the Nehalem River Lumber Company, at Timber, Oregon, the purchase of the timber on a quarter section of land near Timber, in Tillamook County, the present owner of the timber or quarter section submitting a price of practically $40,000 for the timber on that quarter section, reserving the title to the land for reforesting, or for logged off purposes, or for any useful purpose, if there is any, and merely proposing to sell the timber, this timber being situated close to a sawmill situated on the Pacific Railway and Navigation Company's line west of Hillsboro. Do you or do you not regard that as an extravagant price for timber on a quarter section of the best fir land in this country, situated on a railroad close to a mill?

Mr. Townsend: Objected to as incompetent, irrelevant and immaterial.

A. It would be for any quarter section of O. & C. lands in the Willamette Valley that I know anything about. The timber in the Nehalem country is, I understand, somewhat different from what it is here.

Whereupon witness further testified that he has no present knowledge of any quarter section in the Siuslaw country or elsewhere in Lane County being sold for more than the price he paid for the quarter section mentioned, $3500.00 for 160 acres. He knows of one quar-

ter section that the purchaser told him he paid $5000 for, and he thinks that he did. He knows of the purchase made by the Wendling Johnson Lumber Company. The lands were west of the Coast Range, practically all in Lane County, although there may have been a very little of it in Douglas County, but he thinks not. The men who did the buying told him approximately the amount of money expended, which was between a million and a quarter and a million and a half dollars, but the amount of acreage he never heard. The purchase was made from a great many different individuals and ran along for several months as different titles came in. Booth-Kelly Lumber Company had about 2200 acres there that they sold and he thinks that sale was consummated in January, 1912. The Booth-Kelly Lumber Company got for these 2200 acres $54,000, about $24.00 an acre. The Booth-Kelly Lumber Company had a cruise on these lands and the sale price was made on the basis of approximately $1.00 per thousand feet. These lands were situated near the Siuslaw River, scattered some on the east side and some on the west side of the Coast Range, about 30 to 36 miles west of Eugene. These lands were in Lane County, just outside the limits of this grant, he thinks. The deed was passed in January or February, 1912. He was present at a number of hearings before the Committee on Public Lands of the House of Representatives on the hearing of H. R. 22002, concerning the Oregon and California land grant, and made a verbal statement to the Committee. He was acting for the Booth-Kelly Lumber

Company and almost all of the other defendants in what are known as the "Forty-five Innocent Purchaser Suits." When he made that statement he was not acting for all of them, but most of them, and he made the statement found at pages 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66 of a document published by the Government Printing Office at Washington, 1912, entitled "Oregon and California Land Grant Hearings Before the Committee on the Public Lands, House of Representatives on H. R. 22002, Concerning the Oregon and California Land Grant April 2, and May 2, 6, 8 and 25, 1912," and reading from that statement, pages 55 to 66, both inclusive, the witness said that is the statement he made.

Q. Now, I call your attention particularly to this part of your statement:

"Now, as to our views relative to our situation and to the compromise, we feel that the Government can afford to be very considerate of us for a number of reasons. First, going back to the purpose of Congress in granting these lands, it was primarily that the road be built, and, secondarily, that the country be developed as a result of this grant of land. We take the position that we have aided in the development of that section of the country to the fullest extent, and that in no other way could the lands have been used for development except in the way we have used them.

"The reason for that is this: The land is heavily timbered, much of it on steep hillsides, and in most in-

stances the soil is rocky and not susceptible of cultivation. Now, no actual settler could have taken 160 acres of these lands, nor 1600 acres, nor any other number of acres, and made a living for himself and family. It would have been practically impossible, and is today, with the better means of transportation and other facilities that they have now."

What is the fact as to the accuracy of that statement, and is that based upon your personal knowledge?

Mr. Townsend: That is objected to as incompetent, irrelevant and immaterial, hearsay, and an attempt to incorporate into the record mere conclusions of fact and law and not evidentiary matters.

A. The statement is correct, as I thought at that time, and believe now.

Q. I call your attention to a statement on page 58 of this document, which reads:

"We think that there is no question about the original purpose of the Government having been literally carried out in a much better way than it could have been under actual settlement. In this regard, Secretary Fisher, in talking to me the other day, said that if the lands were of the character I said they were the Government made a tremendous mistake in 1866 in granting to the railroad company lands of a character not susceptible to settlement and then asking the railroad to sell them only to actual settlers. Now, they did do that, and you must know without seeing photographs of the timber that these lands are timberlands or we would not

have them, because we are in the timber business only. Now, if the Government did make this mistake 40 years ago we ask you here that we be relieved from the ill effects of it."

What have you to say with reference to the truth of that statement?

A. The statement that I had this conversation with Mr. Fisher, that he stated what I said there and my reply is correct, and the rest of it was my opinion at that time and is now.

Whereupon complainant objected to this testimony as incompetent, irrelevant and immaterial and hearsay and an attempt to incorporate into the records mere conclusions of fact and law and not evidentiary matter, but a mere argument made by witness on behalf of one of the parties against whom the United States had instituted its suit, as a reason for urging Congress to authorize this compromise, and complainant particularly objects, to the method of examination, in reading to the witness, hearsay statements, and incorporating them, in this record, as evidence of the statements themselves.

Whereupon witness testified that the statement:

"We have done the larger part of the work necessary to make that land valuable for cultivation, and nobody wants to buy these lands now as homesteads at any price. Eighty-five or ninety per cent of them are useful only for reforestation, and we have not started to reforest them because we do not know to whom they belong. We have spent the necessary money to clear them of tim-

ber, and if the intention was that actual settlers should make homes on these lands, how much less useful for this purpose would they be if the timber was still standing?" and which contains the words "nobody wants to buy these lands now as homesteads at any price," he thought was not sufficiently full as to the use to which these lands could be put. He stated that they could be used only for reforestation, at least 80 or 85 per cent. He should have said reforestation or pasture because he knows that they are used for that. It was an oversight that he did not say so. To which testimony of the witness complainant objected as incompetent, irrelevant and immaterial and upon the further ground that the lands were involved in litigation in which injunction was asked against the incumbrance of the title.

Whereupon witness further testified that it is a fact that no one wanted to buy these lands as homesteads at any price. There have been some applications to buy small pieces, a few acres of bottom or arable land, as there are scattered around through them, but no application to buy for the purpose of buying 160 acres, or anything of that sort to make a living on.

Whereupon the attention of witness was called to page 60 of the statement, which reads:

"The Chairman. You have stated that the lands you have are not fit for actual settlement. Is the general character of these lands the same?

"Mr. Dixon. Well, as I stated, the fact that we purchased the lands for lumbering purposes is pretty

good evidence that the land is not fit for actual settlers. As to the railroad grant itself, I have been over it pretty well a number of times and out into the timber, and I think the actual percentage—anything that I might say would be a guess, but 20 per cent would be a pretty close guess—I think there might be 20 per cent of these lands that can be cultivated."

and testified that what he stated there was a guess and he could not do any better now. His impression is that his statement is correct.

Whereupon the attention of witness was called to a portion of his statement in that document as follows:

"The Chairman. What is the general description of the lands which your client holds?

"Mr. Dixon. They are all timbered lands, all covered with fir timber. They are rather hilly, usually along a little canyon with a creek running down the center. We have five timbered bodies, each one along a creek or river. We like to have them that way on account of the facilities for operation. The timber is cut and hauled down to the creek; then we build dams and float it out to the river or railroad it out."

and witness testified that that statement is correct, except perhaps in using the word "all." The lands are all timbered lands technically, that is incorrect because there are a few acres now and then that are not in timber, but the statement is to all intents and purposes correct. Those acres that might be capable of cultivation are widely separated from the rest, in spots here and there throughout the grant.

Whereupon there was read to the witness from said statement the following:

"The Chairman. What area of lands that have been cut off have been sold approximately?

"Mr. Dixon. Practically none."

Is that correct?

A. That is correct.

Q. "The Chairman. What area of them, if any, has been cultivated.

"Mr. Dixon. Practically none. They are not susceptible of cultivation. Our idea has been to reforest them, and we have left the small timber standing for that purpose."

What do you say as to the accuracy of that statement?

and the witness answered that that is correct. He would say that the idea of reforestation and pasturage is not paradoxical or incompatible. They go together and the Booth-Kelly Lumber Company has pasture land but thought perhaps later it might be reforestered.

Whereupon defendants offered in evidence the entire statement of the witness, together with the opening introduction of the Committee on Public Lands, House of Representatives, etc., pages 55 to 66 both inclusive and asked to have same read into the record.

Whereupon counsel for complainant objected to the document upon the same grounds hereinbefore set out but waived objection as to reading the same in to the record, which portion of said document reads as follows:

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